114-511

IN THE

Supreme Court of the United States.

STEPHEN B. STURGES, Plaintiff in Error,

No. 217. *vs.*

MERCHANT CARTER, *Treasurer of Richland County, Ohio*,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

ARGUMENT OF C. H. SCRIBNER,

OF COUNSEL FOR PLAINTIFF IN ERROR.

THE B. F. WADE CO., PRINTERS, TOLEDO.

IN THE

Supreme Court of the United States.

STEPHEN B. STURGES, PLAINTIFF IN ERROR,

No. 217. *vs.*

MERCHANT CARTER, *Treasurer of Richland County, Ohio,*

DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

ARGUMENT OF C. H. SCRIBNER,

OF COUNSEL FOR PLAINTIFF IN ERROR.

THE CASE STATED.

This was an action originally brought in the Court of Common Pleas of Richland county, Ohio, by John A. Lee, as treasurer of that county, to recover of Stephen B. Sturges, the present plaintiff in error, alleged taxes levied for the years 1874, 1875, 1876 and 1877, upon $100,000 of Western Union Telegraph stock; also, for the year 1875 upon $35,000 of credits; for the year 1876 upon $41,000 of credits; and for the year 1877 upon $41,000 of credits;

also, for ten per cent. penalty upon the entire amount of taxes claimed to be due. The aggregate amount of taxes sued for was $10,776 83; the penalty thereon of ten per cent. amounted to $1,077.68, making a total of $11,854 50, for which, with alleged arrears of interest, judgment was demanded.

This demand of the treasurer for taxes and penalty was made up of the following items:

For the year 1874, taxes on $100,000 Western Union stock,	$2 070.00
Penalty on same, 10 per cent.,	207.00
For the year 1875, $100,000 Western Union stock, and $35,000 credits, tax,	2,823.38
Penalty,	282.33
For the year 1876, $100,000 Western Union stock, and $41,000 credits, tax,	2,977.00
Penalty,	297.70
For the year 1877, $100,000 Western Union stock, credits $41,000, tax,	2,906 45
Penalty,	29 06
Total,	$11,854 50

[Record pp. 60, 61]

The petition in the case, which was filed August 17, 1878, [Rec 6], reads as follows:

PETITION.

JOHN A. LEE, Treasurer of Richland County, Ohio, *Plaintiff* AGAINST STEPHEN B. STURGES, *Defendant.*	COURT OF COMMON PLEAS OF RICHLAND COUNTY, OHIO.

The said plaintiff, John A. Lee, says that he is the duly elected, qualified and acting Treasurer of the county of Richland, and

State of Ohio, and he further says that there stands charged upon the tax duplicate of said county against said Stephen B. Sturges for personal taxes the sum of ten thousand seven hundred and seventy-six and eighty-three one hundredths dollars ($10,776.83), together with the penalty thereon amounting to the further sum of $1,077.68, being ten per cent on said first named sum as provided by law.

Plaintiff further says that the said taxes and penalty are due and unpaid, and that said defendant, Stephen B. Sturges, is indebted to plaintiff as such Treasurer in said sum of $11,854 51, so appearing to be due on said duplicate.

Wherefore plaintiff prays judgment against said defendant for said sum of eleven thousand eight hundred and fifty-four and fifty-one one hundredths dollars ($11,854 51), together with costs of suit and interest on said $11,854.51 from the 15th day of August, 1878.

JENNER & JENNER,
Attorneys for Plaintiff.

This petition was verified as required by statute. The action was brought under the following statute, then in force in the State of Ohio:

"When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as prima facie evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any other further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property from levy or sale on execution in the enforcement of any such judgment"—[Act of May 11, 1878, Ohio Laws, vol. 75, p. 485, Sec. 22; 1 Rev. Stats. of Ohio, of 1880, p. 747, Sec. 2859].

The sheriff of Richland county made return upon the summons issued in the case that he had served the same upon the defendant August 24, 1878. [Rec. 9.]

On the 9th day of September, 1878, the defendant, by his attorneys, filed a motion asking the court to require the plaintiff to separately state and number his several causes of action; also, that the plaintiff might be required to make his petition more definite by stating the facts which he claimed entitled him to recover the penalty therein sued for. [Rec. 10.] At the September term of the court, (1878), this motion was heard and overruled. [Ibid.] At the same term the defendant filed a demurrer to the allegations of the petition charging him with ten per cent. penalty upon the alleged tax, assigning as cause of demurrer that the petition did not state facts sufficient to enable the plaintiff to recover the penalty. [Rec. 11.] This demurrer was overruled September 25, 1878. The defendant excepted. [Ibid.] Thereupon the cause was continued with leave to the defendant to answer within thirty days after the adjournment of the term. [Ibid.]

The answer of the defendant, which was filed November 15, 1878, [Ibid.,] reads as follows:

ANSWER.

JOHN A. LEE, Treasurer of
Richland County, Ohio,
Plaintiff,
AGAINST
STEPHEN B. STURGES,
Defendant.

IN THE COURT OF
COMMON PLEAS OF
RICHLAND COUNTY,
OHIO.

For answer to the plaintiff's petition defendant says that of the sum sued for in this action is the tax upon Western Union Telegraph stocks of the value of $100,000, claimed to have been owned by defendant in the year 1874, for which $2,070 and a penalty thereon of ten per cent. is claimed in this suit.

Defendant further says that for said year 1874 he listed his personal property for taxation to the Assessor of the First Ward of the city of Mansfield, Richland County, Ohio, where he then resided, that the amount of personal property so listed by him was $2,520, and was by said Assessor duly returned to the Auditor of said county and duly placed upon the tax duplicate and taxes assessed thereon upon said duplicate for the sum of $52.16, which sum of $52.16 this defendant then fully paid to the Treasurer of said county and took his receipt therefor, and that said taxes upon said duplicate for the year 1874 have been fully cancelled and paid as shown by said duplicate.

That there is not now nor ever has been listed or charged against this defendant upon said tax duplicate for the year 1874 any other or further sum or sums whatever, nor has any other or further property of any kind whatever been listed, returned or placed upon said tax duplicate for taxation against this defendant, and at the time of the commencement of this suit no taxes stood charged against defendant upon the tax duplicate of said county for the year 1874, whereas to so much of said cause of action as is for tax and penalty for the year 1874 he prays judgment.

Second. Defendant says that of the sum sued for in this action a portion thereof is a tax upon Western Union Telegraph stock, claimed to have been owned by defendant in the year 1875, of the value of $100,000 and credits to the amount of $35,000 in all for that year the tax on personal property of the value of $135,000, for which taxes are claimed to the amount of $2,823.38, with ten per cent. penalty thereon Defendant says for the year 1875 he listed his personal property for taxation to the Assessor of the First Ward of the city of Mansfield, Richland county, where he then resided, at the sum of $2,550 That his said personal property was duly placed upon the tax duplicate of said county for the year 1875 at said sum of $2,550.

And taxes for that year assessed thereon at $53.30 That he then paid to the Treasurer of said Richland county said sum of $53.30 and took his receipt therefor, and upon said tax duplicate for said year said tax is shown to have been fully paid. There does not now stand nor since has there stood charged against him upon the tax duplicate of said county for the year 1875 for taxes on personal property for any sum whatever.

He therefore prays that as to said taxes for the year 1875 and the penalty thereon he may be dismissed with his costs.

Third. Defendant says that of the sum sued for is the tax upon Western Union Telegraph stock of the value of $100,000, claimed to have been owned by defendant in the year 1876, and $41,000 of credits claimed to have been owned by him for that year, in all $141,000, with a penalty thereon of ten per cent., in all of the sum of $2,977 and ten per cent. thereon; defendant says that for said year 1876 he duly listed his personal property for taxation to the Assessor of the First Ward of the city of Mansfield, Richland county, at the sum of $2,100. That said sum was placed upon the tax duplicate for said county for that year and taxes assessed against him thereon in the sum of $44.31, which last named sum he then paid and took the receipt therefor from the Treasurer of Richland County. That said tax appears upon said duplicate duly paid and satisfied. That there was not at the time of the commencement of this suit nor since has been any tax or penalty charged against him on the tax duplicate of said county for the year 1876.

Wherefore he prays judgment against the plaintiff as to so much of said cause of action as consists of taxes and penalty for the year 1876.

Fourth. Defendant says that said cause of action against him is for taxes and penalty on personal property for the years 1874, 1875, 1876 and 1877, in the aggregate $10,776.83, and penalty thereon of ten per cent., of which sum, $2,906.45 and penalty thereon of ten per cent. is for pretended taxes and penalty for the year 1877. That a portion of said tax purports to have been assessed upon Western Union Telegraph stocks, of the value of $100,000, and the residue upon credits of the value of $41,000.

Defendant says that, for the year 1877, he listed his personal property for taxation at the valuation of $1,920 00, to the assessor of the first ward of the city of Mansfield, in said county; that said personal property was duly placed upon the tax duplicate of said county for taxation at said valuation, and taxes duly assessed thereon to the amount of $39.55 for said year 1877. That the defendant then paid said sum to the Treasurer of Richland county, and took his receipt therefor, and said taxes appear upon said tax duplicate fully paid and cancelled.

Defendant says that the assessor of the first ward, of the city of Mansfield, county of Richland, for each of the years 1875, 1876 and 1877, returned to the auditor of Richland county as listed by defendant, a list of the personal property of defendant for taxation according to law upon regular tax lists, that for each of said years, said personal property was duly entered upon said tax duplicate of said county for each of said years respectively; the taxes were, each year, duly assessed thereon, and were all paid, when they became due, by defendant. That said tax lists, so returned to said auditor, still remain unchanged, and no correction has ever been made or attempted thereon, nor did said auditor at any time notify this defendant of his intention to make an entry upon, or change or correct said tax lists so returned to him, filed with him by said assessor, or that he intended to enter upon the tax duplicate of said county, any further sum of taxes against the defendant for either of said years.

That said pretended cause of action is for taxes wrongfully placed upon the tax duplicate of said county for the year 1877, by the auditor of said county, contrary to law; That said taxes were so placed upon said duplicate in the month of September, 1878, after the taxes for said year had been duly paid by defendant, and without notice to defendant, and without his having an opportunity of showing that his statement and the returns of said assessor were correct.

Wherefore, defendant prays judgment in his favor.

Fifth. Defendant says, during the years 1874, 1875, 1876 and 1877, although he was a resident of the first ward of the city of Mansfield, he carried on business in the city of New York, in the state of New York, and there, in person and through his agents, bought and sold stocks.

That of the taxes and penalty for which this suit is brought, $9.157 taxes and $1,915.70 penalty, is for taxes and penalty upon $100,000 in value of the capital stock of the Western Union Telegraph Company, claimed to have been owned by defendant during the years 1874, 1875, 1876 and 1877, which stock, nor any part thereof, was ever in the state of Ohio, but certificates were issued therefor by said Western Union Telegraph Company and purchased by defendant in said city of New York, and there kept and used in his said business.

That the said Western Union Telegraph Company is an incorporated telegraph company, under the laws of the state of New York, but said New York corporation transacts a large portion of its business in the state of Ohio, by transmitting to, from, through and in said state, telegraphic messages, and has a large portion of its property and capital located in the state of Ohio.

That said corporation, for all of said years, 1874, 1875, 1876 and 1877. paid taxes upon its property and capital in the state of New York, and for each and all of said years paid taxes in the state of Ohio upon its property and capital in said state, and, in addition to the payment of taxes upon its property and capital in the state of Ohio, paid taxes upon all the gross receipts of its business in said state, which taxes so paid, amounted to the sum of $——

Defendant says, that said Western Union Telegraph Company, during all of said years 1874, 1875, 1876 and 1877, was required to list and return its capital and property for taxation in the State of Ohio, and did so list and return its capital and property in said State, and duly paid the taxes thereon, and that value of said capital and property so listed in said State by it was much greater than all the certificates of its capital stock owned or held by residents of the State of Ohio.

Defendant says, that he did not owe any of the cause of action sought to be recovered as penalty; that no penalty has ever accrued upon said taxes so placed upon said duplicate in September last.

DIRLAM & LEYMAN,
Defendant's Attorneys.

THE STATE OF NEW JERSEY, }
County of Bergen, ss. }

Stephen B. Sturges, being duly sworn according to law, deposes and says, that he is the defendant above named, that the facts stated and allegations in this, his foregoing answer, are, as he believes, true.

STEPHEN B STURGES.

Sworn to before me, and subscribed in my presence, this eleventh day of November, A. D. 1878

RUFUS A. GORHAM,
Commissioner of Deeds in and for the County of Bergen.

[Rec. 12—17]

On the second day of December, 1878, the defendant filed in the Court of Common Pleas his petition for the removal of the cause into the Circuit Court of the United States for the Northern District of Ohio, [Rec 18].

A bond in the form required by the Act of Congress accompanied the petition and affidavits, [Ibid. 23].

At the same December term, 1878, the Court of Common Pleas, "ordered that said petition and security be accepted, and the said suit be removed into the next Circuit Court of the United States to be held in said Northern District of Ohio, and that no further proceedings be had in said suit in this Court." [Ibid. 25].

The transcript from the Court of Common Pleas was filed in the Circuit Court December 21, 1878, [Ibid. 26].

On January 5, 1880, Merchant Carter, the present defendant in error, as the successor in office of John A. Lee, the original plaintiff, filed a reply to the answer of the defendant Sturges, which reply reads as follows:

REPLY.

TREASURER OF RICHLAND COUNTY, OHIO, *Plaintiff*, AGAINST STEPHEN B. STURGES, *Defendant*.	CIRCUIT COURT OF THE UNITED STATES

Merchant Carter says that he is the duly elected, qualified and acting treasurer of the county of Richland, State of Ohio; that he succeeded one John A. Lee, as treasurer of said county, and he asks that he may be substituted as plaintiff, instead of said John A. Lee, in the cause now pending in said Circuit Court, in which said Lee, as such treasurer, is plaintiff, and Stephen B. Sturges is defendant.

The plaintiff, for reply to the answer of defendant, says it is true that the taxes sued for cover the years 1874 1875, 1876 and 1877. It is true that for each of said years the defendant made returns of personal property to the assessor in the respective amounts set forth in his said answer, and paid to the treasurer of the county the taxes assessed thereon; and it is true that no other taxes were charged on the duplicate of said county of Richland during said years on personal property against the defendant. It is true that a part of plaintiff's claim consists of a tax assessed upon $100,000 in value of the stock of the Western Union Telegraph Co., and other credits amounting to $35,090 for the year 1875, which the defendant failed and neglected to return to the assessor for taxation in said year or at any other time. It is true that a part of plaintiff's claim consists of a tax assessed upon $100,000 in value of the stock of the Western Union Telegraph Company and other credits amounting to $41,c90 for the year 1876. which the plaintiff failed and neglected to return to the assessor for taxation in said year or at any other time. and it is true that a part of plaintiff's claim is upon the like amount of stocks and credits for the year 1877, which the plaintiff failed and neglected to return to the assessor for taxation in said year or at any other time. And plaintiff admits that his whole claim consists of the taxes on the property aforesaid for each year with the penalty allowed by law thereon Plaintiff admits that at the commencement of this suit said taxes and penalties did not stand charged upon the respective tax duplicates of said Richland county for the years 1874. 1875, 1876 and 1877. The plaintiff admits that the original sheets or returns made by the defendant to the assessor have not been changed, but avers that the amount of property so wrongfully omitted by the defendant has been corrected pursuant to law.

The plaintiff admits that said Western Union Telegraph Company is an incorporation organized under the laws of New York, and that it transacts business and owns property in the State of Ohio. Plaintiff denies that said Western Union Telegraph Company, during said years or any one of them, paid taxes in the State of Ohio (or elsewhere) upon the capital stock, or that it ever listed or returned for taxation its capital stock in the State of Ohio or elsewhere, and the plaintiff denies each and every allegation of said petition not heretofore specifically admitted or denied; and for further reply says that on or about July 23d, 1878, the auditor for said county of Richland was informed that for the years aforesaid the defendant had given to the assessor false statements of his credits, investments, bonds, and stocks, and property, and had not returned the full amount required by law to be listed, and which were by law subject to taxation, to ascertain the truth of which information said auditor took testimony and gave notice to defendant of the same. That defendant appeared and was himself examined and failed to show his returns for said years correct. That as the result of said examination said auditor found that said defendant owned and should have returned for taxation in each of said years the stocks, credits, and property aforesaid, and that the same were omitted from said returns falsely by defendant. And that the same was duly entered upon the books of additions and deductions kept by said auditor, and certified to the treasurer, charged with the collection of the same; of all which defendant had notice. That said taxes remain unpaid and are still due to the plaintiff as such treasurer.

JENNER & TRACY,
ESTEP & SQUIRE,
Att'ys for Plaintiff.

STATE OF OHIO, }
COUNTY OF RICHLAND, SS. }

Merchant Carter, being duly sworn, says that he is the duly elected, qualified and acting treasurer of said county and plaintiff herein: that the facts stated in the foregoing pleading are true as he verily believes.

MERCHANT CARTER,
Treasurer.

Sworn to before me and subscribed in my presence November 25th, 1879.

JAMES S. CRALL,
Deputy Clerk.

[SEAL.]
[Rec. 28—31.]

On the 8th of April, 1880, the parties filed a written stipulation in the case. [Rec. 31.] That part of it which bears upon the present controversy reads as follows:

STIPULATION BETWEEN PARTIES.

JOHN A. LEE, Treasurer of Richland County, Ohio, *Plaintiff*, AGAINST STEPHEN B. STURGES, *Defendant*.	IN THE UNITED STATES CIRCUIT COURT OF THE NORTHERN DISTRICT OF OHIO.

The following facts are mutually agreed to so far as competent for either party in this cause.

The Western Union Telegraph Company is a corporation organized under the laws of the State of New York, and carries on the business of transmitting telegraphic dispatches into and through the State of Ohio and the other States of the United States for the public for hire, and has for the last ten years.

That its capital stock is $41,073,410, all paid up and of value.

That said company owns real estate not in the State of Ohio, exclusive of its line, of the value of $2,635 556 86

That the length of its entire line (poles) is 76,955 miles.

The length of its line in the State of Ohio is 4 950 miles.

Its entire length of wire, 194,323 miles.

Its length of wire in the State of Ohio is 13.500 miles.

That its property within the State of Ohio consists of the said 13,500 miles of wire, the said 4,950 miles of posts, there being from twenty to thirty posts to the mile: the telegraphic apparatus, chemicals and office furniture of 425 offices in said State.

That it has returned said property in the State of Ohio for taxation in the State of Ohio each year since 1872.

That all its other property is located in other States

First. That the plaintiff is now and was at the time he became plaintiff herein, Treasurer of Richland county, Ohio.

Second. That for ten years next before the commencement of this suit, the defendant was a citizen of said county; that for the years 1874, 1875, 1876 and 1877, he made returns in accordance with law purporting to contain full and accurate lists of all his personal property subject to taxation in said county; that said returns were received and acted upon as being correct until the 23d of June, 1878, when the County Auditor caused defendant to be subpœnaed to appear instanter before him at his office in said city, to give information pursuant to the statute in that case provided, of all property within his knowledge which had not been duly returned for taxation. The defendant accordingly appeared and submitted to an examination——Whilst undergoing his said examination, the auditor exhibited to him a list of judgments and mortgages in his favor not included in his said tax returns, and then and there told defendant, that, under the advice of the auditor of State he felt it to be his duty to make a supplemental assessment against him for the four years named, of all the property which he owned during that period which was subject to taxation in said county and not included in his returns; called defendant's attention to the statute under which he proposed to proceed, and requested such explanation as he might deem it proper to make. Defendant thereupon made such explanation, as he chose to offer. This was the only notice given by the auditor to the defendant of his intention to assess him on all personal property owned by defendant during said period and not included in his tax returns.

Third That the auditor then proceeded to assess said omitted property as follows: For 1874, Western Union Telegraph stock, $100 000; for 1875, Western Union Telegraph stock, $100,000; credits, $35,000; for 1876, Western Union Telegraph stock, $100,000; credits, $41,090; for 1877, Western Union Telegraph stock, $100,000; credits, $41 090; entered the same on a supplemental tax duplicate and certified the same to the county treasurer for collection.

Fourth. That defendant owned said telegraph stock and credits so assessed during the four years aforesaid, and that the same had not been included in his said returns for taxation, and that he had not been theretofore charged with or paid any tax on the same.

Fifth. That defendant owned $100,000 of money, during the same period, which he kept in New York for speculative purposes, which was not returned by him for taxation and on which he has paid no taxes, either in New York or Ohio.

Sixth. That defendant, during the entire four years aforesaid, the period covered by said re-assessment, owed *bona fide* liabilities exceeding in amount the aforesaid credits assessed against him

Seventh. That the Western Union Telegraph Company was organized under the laws of New York; that it had a paid up capital of $41,000,000; that most of its property was and is situated outside of Ohio; that it owns 4,950 miles of telegraph lines with the chemicals and office furniture used in connection therewith in Ohio, all which for ten years past it has regularly returned for taxation and paid thereon from $10,000 to $15,000 per annum of tax to the State of Ohio.

From these facts the court deduces the following conclusions of law:

1st. That the auditor possessed no authority, after defendant had made returns as aforesaid of his personal property for taxation, to make a supplemental assessment of property not included in defendant's said returns, without first giving defendant the notice required by the statute in such case provided, and that an assessment made in the absence of such notice would be void.

2d. That the notice given, as shown by the facts found herein, is legally sufficient to sustain the assessment made, provided it was in all other respects regularly made and was authorized by the evidence adduced.

3d. That defendant is entitled to set off his *bona fide* liabilities, which he owed during the years for which he was assessed, against the said assessment of credits; and as these liabilities exceed his credits, no recovery can be had herein for the tax claimed to have been due on said credits.

4th. The money kept by defendant in New York for speculative purposes was taxable in Ohio, the place of defendant's domicile, and ought to have been returned by defendant for that purpose. But as he has not been assessed thereon, or sued therefor in this action, no recovery can be had therefor in this suit.

5th. The auditor's said supplemental assessment was authorized and is regular and valid, and under the statutes of Ohio, as construed by the courts of the State, the defendant is liable in this action for the amounts assessed on his Western Union Telegraph stock, and judgment will therefore be rendered against him for the tax so assessed thereon, with the damages prescribed by statute, and interest and costs.

BAXTER, JUDGE, &C.

To each, all and singular of said findings of fact and as well to each and all of said findings and conclusions of law aforesaid the defendant then excepted. And thereupon came on to be heard the defendant's motion for a new trial, which, upon due consideration by the court, is overruled. It is therefore considered by the court that the plaintiff have and recover from the defendant the sum of ten thousand seven hundred and twenty-seven and sixty-five one hundredths dollars ($10,727.65-100), the sum so as aforesaid found to be due together with the costs of suit to be taxed for which execution may issue. And thereupon came the defendant and tendered his bill of exceptions to the ruling of the court on the trial of said cause and at the request of the defendant the same is signed, sealed and ordered to be made a part of the record of this case, which is accordingly done. [Rec. 64—68.]

A bill of exceptions was taken by the defendant, and ordered to be made part of the record in the case. [Ibid. 72-75]. The questions arising upon it will be presented in the argument.

This writ of error is prosecuted to reverse the judgment of the Circuit Court.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in overruling the objections of the said Stephen B. Sturges to the testimony offered by the plaintiff below on the trial of the cause, and admitting said testimony, as shown in the bill of exceptions.

2. The Circuit Court erred in holding that the notice given by the county auditor of Richland county to the said Stephen B. Sturges, requiring him to appear and give information as to any property, goods or chattels in said county which had not been listed for taxation, was legally sufficient to sustain the additional assessment of taxes made by said auditor against said Sturges.

3. The Circuit Court erred in holding that the facts found by the court established in law the jurisdiction of the auditor of Richland County to enter said additional taxes on the duplicate of said county.

4. The Circuit Court erred in its conclusion and judgment that the facts found by the court as to the notice to said Stephen B. Sturges constituted a legal and sufficient notice to authorize the assessment of said taxes by said auditor.

5. The Circuit Court erred in its finding and conclusion that certificates or shares of capital stock in the Western Union Telegraph Company were taxable in the State of Ohio in the hands of Stephen B. Sturges.

6. The Circuit Court erred in its conclusion and judgment that the auditor of said county of Rich-

land was authorized by the laws of Ohio in force at the time of said assessment to assess a tax upon said shares of the capital stock of said Western Union Telegraph Company for any year prior to the year 1878.

7. The Circuit Court erred in its conclusion and judgment that a penalty had accrued and was chargeable upon the additional taxes assessed by said county auditor against said Stephen B. Sturges; and that interest was chargeable upon said taxes.

ARGUMENT.

I.

No sufficient notice was given by the Auditor of Richland County, under the statutes of Ohio, to entitle him to assess additional taxes against the defendant Sturges. The Circuit Court erred in ruling that the notice given was sufficient, and in admitting the parol evidence objected to by the defendant.

Under this head may be considered the assignments of error numbered one, two, three and four.

It was not disputed on the trial that the defendant Sturges had made returns, upon oath, to the proper assessor, for the years 1874, 1875, 1876 and 1877, of personal property for taxation, in the manner prescribed by the statute; that the assessor had duly reported these returns to the county auditor; that the property so returned had been duly placed upon the tax duplicate by the auditor and taxes regularly assessed thereon upon said duplicate, and that these taxes had been regularly paid by the defendant. [See allegations of the answer, Record 12–15; ante, 5–9; admissions of reply, Record, 29; ante, 11; see, also, these returns set out in full; Record, 37–52.]

But it was claimed on the part of the plaintiff that the defendant had wrongfully omitted to return for taxation the Western Union Telegraph stock and the credits upon which the taxes sued for were assessed; and that the county auditor, in the year 1878, acting by authority of the statutes of Ohio, had entered for taxation the property so omitted and made the proper assessment of taxes thereon.

The defendant avers in his answer, that at the time of the commencement of the action no taxes stood charged against him upon the tax duplicate of said county for the year 1874; also, that "there does not now stand, nor since has there stood charged against him upon the tax duplicate of said county for the year 1875 taxes on personal property for any sum whatever"; also, "that there was not, at the time of the commencement of this suit, nor since has been any tax or penalty charged against him on the tax duplicate of said county for the year 1876." [Rec. 13, 14; ante 5.] The answer also contains this averment: "The said pretended cause of action is for taxes wrongfully placed upon the tax duplicate of said county *for the year 1877*, by the auditor of said county, contrary to law. That said taxes were so placed upon said duplicate in the month of September, 1878, after the taxes for said year had been duly paid by defendant, and without notice to defendant, and without his having an opportunity of showing that his statement and the returns of said assessor were correct.'' [Rec. 15, 16; ante 8.]

The Reply contains the following admission: "Plaintiff admits that at the commencement of this suit said taxes and penalties did not stand charged upon the respective tax duplicates of said Richland county for the years 1874, 1875, 1876 and 1877." Also the following averments:

> On or about July 23, 1878, the auditor for said county of Richland was informed that for the years aforesaid the defendant had given to the assessor false statements of his credits, investments, bonds and stocks and property, and had not returned the full amount required by law to be listed, and which were by law subject to taxation, to ascertain the truth of which information said auditor took testimony, and gave notice to the defendant of the same. That defendant appeared and was himself examined, and failed to show his returns for said years correct.
>
> That as the result of said examination said auditor found that said defendant owned and should have returned for taxation in each of said years the stocks, credits and property aforesaid, and that the same were omitted from said returns falsely by said defendant. And that the same was duly entered upon the books of additions and deductions kept by said auditor, and certified to the treasurer charged with the collection of the same; of all which the defendant had notice. [Rec. 30, 31; ante 12.]

It is proper, in this connection, to refer the court to the provisions of the Ohio statute under which it is claimed these proceedings of the auditor were had.

Section 1034 of the revised statutes of Ohio, page

397, provides how the duplicate, or tax list, as it is called, shall be made out by the auditor ; it is to contain all the real and personal property in the county liable to taxation.

Section 1038 provides how the tax duplicate may be corrected, but especially provides that the body of the duplicate shall not be altered after it goes into the hands of the treasurer ; from the time it goes into the hands of the treasurer the original tax list of the auditor and its duplicate as delivered to the treasurer, must be kept intact and exactly correspond ; there are certain notes that the auditor may make on the margin ; if there is an erroneous charge it must stand on the duplicate, but the auditor may give the person charged his certificate, to be presented to the treasurer. There can be no alteration of the duplicate, or addition to, or subtraction from it after its delivery.

Section 1039 provides that the county auditor shall keep a book of "additions and deductions," in which he shall enter all corrections of the duplicate made after the delivery of the same to the treasurer which either increase or diminish the amount of any tax or assessment as stated in the duplicate ; and besides the original corrections provided for in section 1038, he is required to give to the treasurer in each case a certificate of the correction.

Section 1041 provides that on the duplicate, as made out, the tax shall be placed opposite the name in two columns, and the road tax added to the first column.

The duplicate must be in the hands of the treasurer on or before the first day of October of each year. Sec. 1042.

Each yearly settlement of the duplicate is required to be made on or before the 10th day of August. Section 1043.

Sections 2781 and 2782 are as follows :

Sec. 2781. If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or to the county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain, as far as practicable, the true amount of personal property, moneys, credits and investments, that such person ought to have returned or listed, to which amount he shall add fifty per centum, and place the same on the tax list; and the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and corrections are made, but as to former years, no penalty shall be added, and only simple taxes shall be claimed.

Sec. 2782. The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed, at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return; and it shall be the duty of the auditor, in all such cases, to notify every such person, before making the entry on the tax-list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct; and the county auditor shall, in all such cases, file in his office a statement of the facts or evidence upon which he made such correction; but he shall, in no case, reduce the amount returned by the assessor, without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor. In all cases in which any person shall make a false statement of the amount of property for taxation, to evade the payment of taxes, in whole or in part, the person making such false statement shall be liable for, and pay all costs and expenses that may be incurred under the provisions of this section, and the same fees and costs shall be allowed and paid as are now or may be allowed by law, for similar services, and if not paid, may be collected before any justice of the peace of the proper county, by suit in the name of the county commissioners, but in all cases under this section, where the statement shall be found correct, and no intention to evade the payment of taxes, the costs and expenses incurred under this section shall be paid out of the county treasury of the proper county, on the order of the county auditor.

It will be seen that by section 2782, the auditor is empowered to compel the attendance of witnesses to enable him to ascertain and determine whether or not false or erroneous returns have been made of personal property subject to taxation. By section 2781 he is authorized to place upon the "tax list," the amount of property wrongfully withheld, with fifty per centum added. But section 2782 expressly provides that

It shall be the duty of the auditor, in all such cases, to notify every such person before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct.

These provisions of sections 2781 and 2782 are in derogation of private right, and should be strictly construed and followed. Every requirement intended to protect and benefit the citizen is mandatory and must be literally complied with. *French* v. *Edwards,* 13 Wallace, 506, 511; *Clark* v. *Crane,* 5 Mich., 151; *Sharp* v. *Speer,* 4 Hill, 76; *Sharp* v. *Johnson,* 4 Hill, 92; *Newell* v. *Wheeler,* 48 New York, 486, and 46 New York, 546.

The notice required by the provision above quoted is jurisdictional. In the case at bar the auditor undertook to act after the alleged delinquent had regularly made his return under oath, and that return had been received by the assessor, and by him returned to the county auditor; and after the auditor, acting thereon, had placed the property on the tax list made out by him, and had certified a duplicate of the same to the treasurer, and the treasurer had collected the amount assessed. Under such circumstances the notice stands in the place of a summons. Its object is to give the party his day in court. It stands on the same footing as other judicial notices. It must be in writing. A reasonable time must be given the party proceeded against to make his defense. The notice must be definite and certain, containing within itself all that the statute contemplates. It is not to be proved by the uncertain recollection of interested parties as to what may have been said in casual conversations relating to other transactions;

especially where, as in this case, such transactions are to be put in writing and preserved. See *Gilbert* v. *Columbus Turnpike Co.*, 3 John. Cases, 107; Exparte *Cooper*, 15 John. 533; *McEwen* v. *Montgomery Co. Mutual Insurance Co.*, 5 Hill, 101.

The Supreme Court of Ohio, in a case involving the construction of a similar statute said:

> We cannot regard the provision of the statute requiring notice, as *directory* merely. It is not matter of form only, but of substance. Where a statement of property subject to taxation has been made out, and verified by the oath of the party, returned to the proper officer, and by him accepted as such, and the amount therein stated is entered upon the duplicate for taxation, it cannot be that the legislature intended to put it in the power of the auditor to increase this amount without notice to the party interested. We apprehend the provisions of the statute, as to the issuing and service of a summons to bring the defendant into court in a civil action are not simply directory: and that a substantial compliance with them is essential to the validity of the subsequent judgment. *The Champaign Co. Bk.* v. *Smith*, 7 Ohio St, 42, 49. Opinion by SCOTT, J.

In passing upon this branch of the case, the Circuit Court found

> 1. That the auditor possessed no authority, after defendant had made returns as aforesaid of his personal property for taxation, to make a supplemental assessment of property not included in defendant's said returns, without first giving defendant the notice required by the statute in such case provided, and that an assessment made in the absence of such notice would be void.
>
> 2. That the notice given, as shown by the facts found herein, is legally sufficient to sustain the assessment made, provided it was in all other respects regularly made and was authorized by the evidence adduced.

It is insisted on the part of the plaintiff in error, that the notice given, as shown by the facts found, is *not* legally sufficient to sustain the assessment.

Among the stipulations in the agreed case, is the following:

It is further stipulated that the notice hereto attached, marked Exhibit "K" is all the written notice served upon S. B Sturges before said taxes were assessed against him.

Exhibit "K."

MANSFIELD, O., July 23, 1878.

To STEPHEN B. STURGES: You are hereby notified to appear at the auditor's office in Mansfield, Richland county, Ohio, on this the 23d day of July, 1878, at ten o'clock, A. M , to give information as to any property, goods, or chattels in said county which has not been listed for taxation as provided by law.

M. D. WARD.

(Rec. 35, ante 14. See also Bill of Exceptions, Rec 72, 73).

The Circuit Court in this connection, made the following findings of fact:

Second. That for ten years next before the commencement of this suit, the defendant was a citizen of said county; that for the years 1874, 1875, 1876 and 1877, he made returns in accordance with law purporting to contain full and accurate lists of all his personal property subject to taxation in said county; that said returns were received and acted upon as being correct until the 23d of June, 1878, when the county auditor caused defendant to be subpoenaed to appear instanter before him at his office in said city, to give information pursuant to the statute in that case provided, of all property within his knowledge which had not been duly returned for taxation. The defendant accordingly appeared and submitted to an examination——Whilst undergoing his said examination, the auditor exhibited to him a list of judgments and mortgages in his favor not included in his said tax returns, and then and there told defendant, that, under the advice of the auditor of state, he felt it to be his duty to make a supplemental assessment against him for the four years named, of all the property which he owned during that period which was subject to taxation in said county and not included in his returns; called defendant's attention to the statute under which he proposed to proceed, and requested such explanation as he might deem it proper to make. Defendant thereupon made such explanation, as he chose to offer. *This was the only notice given by the auditor to the defendant of his intention to assess him on all personal property owned by defendant during said period and not included in his tax returns.* (Rec. 65; ante 16.)

The written notification served was simply a subpœna, issued in pursuance of section 2782, requiring Mr. Sturges to appear and give information as to any personal property in the county which had not been listed for taxation as provided by law. It required him to appear "instanter," as found by the court. This subpœna can not be made to do duty as the notice required. It did not indicate any purpose to assess additional taxes against the person summoned as a witness. Other witnesses were subpœnaed at the same time. What was done under the subpœna appears in the record, and in substance it was this: An abstract from the recorder's office containing all mortgages that had ever been recorded in favor of S. B. Sturges, and an abstract of judgments in his favor was shown him, and he was asked if they were correct. The stipulation shows his answer. Some had been paid; some represented no values; some had been omitted. The auditor did not go into particulars as to debts that were by express provision of the statute to compensate the credits so far as they would go, but it appears generally that his debts were larger than his credits.

There was then no *written* notice of any purpose on the part of the auditor to make a new and supplemental assessment against the defendant. Was it competent to prove a *parol* notice, alleged to have been given while the defendant was on the stand as a witness in obedience to a subpœna issued by the auditor? Evidence of this kind was given by the plaintiff against the objection of the defendant, and the defendant duly excepted. (Rec. 73-4.) The finding of the court that a legal and sufficient notice had been given, was based as before shown, upon the subpœna served upon the defendant, and the parol statement of the auditor objected to as above stated. The grounds upon which we rest our objection to this testimony, and the sufficiency of the notice, have already been stated And, as declared by the Circuit Court, "an assessment made in the absence of" the required "notice would be void," and the action must fail.

Another objection to the maintenance of the action may be properly considered under the assignments of error now under discussion. Section 2859 of the Revised Statutes, under which the action is brought, has no application, as we insist, to a case like the present. It is only applicable where taxes have gone upon the duplicate in the ordinary manner. The duplicate is the foundation of the action. The supplemental assessments sued for here have never gone upon the duplicate. The statute is not to be construed to embrace matters not within its letter and spirit. The agreed case shows that the tax was entered by the auditor on his book of additions and deductions, and the copies of these entries show that the allegations of the answer are true; that the tax in controversy never has been entered on the duplicate in a legal sense. It follows, as we insist that it can not be proceeded for in the summary way provided by section 2859 of the statutes. Objection to the petition was taken at the outset by the defendant, both by motion and demurrer. [Rec. 10, 11.]

II.

The Circuit Court erred in its conclusion and judgment that certificates or shares of capital stock in the Western Union Telegraph Company were taxable in the State of Ohio, in the hands of the said Stephen B. Sturges.

This is the fifth assignment of error.

The Circuit Court found against the plaintiff in respect to the additional assessment made on account of alleged credits, but sustained the assessment upon the stock of the Western Union Telegraph Company. [Rec. 66, 67; ante 17]. Judgment was rendered for $10,727.65, made up entirely of the amounts assessed upon this stock for the years 1874 to 1877 inclusive, interest thereon, and a penalty of ten per cent. [Rec. 68: ante 17, 18.]

The defendant never denied that he held the stock, but always claimed that it was not liable to taxation. So far as the merits of the controversy are concerned, the principal and substantial question arises upon the ruling of the Circuit Court holding that the shares of stock were liable to taxation. As to this branch of the case the facts were agreed upon by the parties. [Rec. 32, 33; ante 13.] The following special finding of the court is in conformity with the stipulation.

> *Seventh* That the Western Union Telegraph Company was organized under the laws of New York, that it has a paid up capital of $41,000,000; that most of its property was and is situated outside of Ohio; that it owns 4,950 miles of telegraph lines with the chemicals and office furniture used in connection therewith, in Ohio, all which for ten years past it has regularly returned for taxation, and paid thereon from $10,000 to $15,000 per annum of tax to the State of Ohio. (Rec. 66; ante 17.)

And as a conclusion of law the court adjudged that—

> The auditor's said supplemental assessment was authorized, and is regular and valid, and under the statutes of Ohio, as construed by the courts of the state, the defendant is liable in this action for the amounts assessed on his Western Union Telegraph stock, and judgment will therefore be rendered against him for the tax so assessed thereon, with the damages prescribed by statute, and interest and costs. [Rec. 67; ante 17, 18.]

From the more specific statements in the agreed case, it appears that the telegraph company has some thirteen thousand miles of wire in the state of Ohio; nearly five thousand miles of posts; four hundred and twenty-five offices; its telegraph apparatus, its offices and furniture. All this property has been regularly returned for taxation, and taxes paid thereon in the state of Ohio, since 1872; the amount so paid being from ten to fifteen thousand dollars annually, distributed among the different counties through which its lines are constructed. It has never been determined in the state courts of Ohio, that the capital stock of a foreign corporation doing business, and having property in the state, which it returns for taxation as provided by law, may be taxed in the hands of its shareholders. On the contrary we insist that the statutes in force during the period for which the assessment in controversy was made, as construed by the State Supreme Court, exempted such shares from taxation. It will be observed that the learned judge who decided the case below, placed his decision upon the ground that "the statutes of Ohio, *as construed by the courts of the state,*" authorized the assessment complained of. He did not profess to determine for himself what was the proper construction of the statutes relied upon. We hope to satisfy this court that the learned judge was in error as to the rulings of the state court upon the question at issue.

The State Supreme Court has decided that the shares of foreign corporations having no property and paying no taxes in the state, are taxable in the hands of a citizen of the state. But this is as far as that court has gone in any reported case

The statutes governing the rights of the parties in this action are found in the revision of Swan & Critchfield. I refer the court to volume two, page 1438, where the statute providing for the assessment and taxation of property, in force during the period involved in this controversy, is contained.

The first section declares in general language what property shall be listed for taxation. The second section defines the terms used in the first section. The third section describes what public and other property shall be exempt from taxation, and contains the following important provision, bearing directly upon the question now under discussion:

> No person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which he is required to list, *any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State.* 2 S. & C. 1441, Sec. 3, Sub-divis. 9

This clause is omitted from the act of 1878, which forms a part of the revision of 1880; but it was in force from 1859 down to July 1, 1878. Ohio Laws, Vol. 75, pp. 436, 507.

Section 59 of the act governing the present case contains the following provision:

> No person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of said company. 2 S. & C. 1460 Sec 59.

This provision was carried into the act of 1878, (Vol. 75, p. 446, Sec. 13), and thence into the Revised Statutes of 1880. 1 Rev. Stat. 1880, Sec. 2746.

There were in force then in 1874 to 1877, inclusive, when it is claimed that the stock of the Western Union Telegraph Company was subject to taxation, these two provisions: one which declared that no person should be required to return for taxation "any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this state;" the other providing that no person should be required to list for taxation any certificate of the capital stock of any company the capital stock of which was taxed in the name of such company.

In Swan & Critchfield, Vol. 2, p. 1446, Section 16, we find what corporations were required to have their property or capital listed for taxation in Ohio:

> The president, secretary, or principal accounting officer of every canal or slack-water navigation company, railroad company, turnpike company, plank road company, bridge company, insurance company, *telegraph company*, or other joint stock company, except banking, or other corporations whose taxation is specifically provided for in this act, for whatever purpose they may have been created, *whether incorporated by any law of this State or not*, shall list for taxation, verified by the oath or affirmation of the person so listing, *all the personal property*, which shall be held to include road bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, *moneys and credits of such company or corporation*, WITHIN THE STATE, at the actual value in money, in the manner following.

The Statute then proceeds to point out the officer to whom the return shall be made; what it shall contain; the manner in which the apportionment shall be made to the different wards, cities, etc., and directs that

> *All property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, incorporated village or township.*

And further

> If the county auditor to whom returns are made is of the

opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed in the same manner as is prescribed in the several sections of this act regulating the duties of county auditors.

The following, which is the concluding paragraph of the section, may aid us in arriving at the intent of the legislature:

> Provided that every agency of an insurance company *incorporated by the authority of any other state or government*, shall return to the auditor of the county in which the office or agency of such company may be kept, in the month of May annually, the amount of the gross receipts of such agency, which shall be entered upon the tax list of the proper county, and subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located.

By the statute above quoted the legislature provides for the taxation of the property of corporations, whether domestic or foreign, within the state. "Except as to banking or other corporations whose taxation is specifically provided for," the rule as to the taxation of the property of corporations is uniform. By the sixtieth section of "an act to incorporate the State Bank of Ohio and other banking companies," (1 S. & C. p. 139), a special rate of taxation was provided for as to the banking corporations created by that act. See also section sixty, 2 S. & C. 1460. And by the concluding paragraph above quoted from section sixteen of the statute regulating taxation, we see that a special rule was provided for taxing foreign insurance companies doing business in Ohio. But the Western Union Telegraph Company was one of the corporations expressly required by said section sixteen to "list for taxation," "all the personal property" "of such company or corporation *within the State*, at the actual value in money," which "property so listed" was made subject to and was required to "pay the same taxes as other property listed in such ward, city, incorporated village or township."

It may be noted here that by a later enactment, telegraph companies were also taxed upon their gross receipts; but it was at the same time provided that this should not release them from the payment of taxes upon their property, as required by section sixteen above quoted. Act of April 13, 1862; Swan & Sayler, 771, Sec. 53.

We have, then, these several provisions in the same enactment, bearing directly upon the question in controversy:

1. That no person shall be required to return for taxation "any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Sec. 3, Sub-divis. 9. 2. That "no person shall be required to list for taxation any certificate of the capital stock of any company the capital stock of which is taxed in the name of said company." Sec. 59. 3. The requirement that the Western Union Telegraph Company shall list for taxation its property within the State. Sec. 16. We have also the established fact that this company,

which has a large amount of property within the State, has regularly returned it for taxation, and paid the taxes assessed upon it. The conclusion follows, as we insist, that the stock of that company was not liable to taxation in the hands of the defendant.

It is claimed on the part of the treasurer, that the corporation must return *all* its capital or *all* its property for taxation in this State in order to protect a holder of its shares from liability to taxation. It has been claimed, also, that sub-division nine of section three, and section fifty-nine of the statute, before referred to, apply only to domestic corporations; and that shares in the capital stock of these are not exempt unless the corporation returns its entire capital stock for taxation.

Upon this subject I desire to call attention to the case of *Jones, Auditor* vs. *Davis*, 35 Ohio State Reports, 474, in which section fifty-nine of the taxing act came under review. It has already been stated that so much of that section as relates to the point under discussion was carried into the act of 1878; (Vol. 75, p. 446, Sec. 13), and thence into the revision of 1880: 1 Rev. Stats. 1880, Sec. 2746. The following is from the syllabus of the case:

> The personal property which a corporation, organized and doing business under the laws of this State, was required to list for taxation, by section 11 of the act of May 11, 1878, (75 Ohio L. 436), embraced the capital stock of the corporation, and such being the case, an owner of shares of the capital stock of such company was not required to list his shares for taxation.

This case is valuable as showing what the Supreme Court of the State has declared to be the meaning of the term "capital stock" as used in the Statute. The court decided that by the "capital stock" of the company" was meant its property. We can readily understand that there might be a wide difference between the value of the capital stock of a corporation, and the value of its property; that is to say, a corporation might have a large amount of valuable property, while its stock—its property, being incumbered—would be of but little value.

The following is taken from the statement of the case:

> The defendant, Davis, was the owner of 200 shares, of $100 each, of the capital stock of the Toledo and Wabash Elevator Company, a corporation organized under the laws of Ohio, for the purpose of elevating and storing grain, and carrying on its business at Toledo. All its capital stock was invested in such real and personal estate as was necessary for the daily conduct and operation of its business, and the same was duly listed by the company for taxation in 1879, together with its moneys and credits, according to the requirements of the statute.

That is to say, the *property* of the company was listed. Its *capital stock*, in the sense in which its capital is distinguished from its property, was not listed.

The following is also taken from the statement of the case:

> In April of that year the board of equalization of the city of Toledo assumed to add to the return of Davis, for that year, the sum of $12,000, the alleged value of the 200 shares of stock, and directed the auditor of Lucas county to place the same on the duplicate, and to levy the proper proportion of taxes thereon for state, county and city purposes The Common Pleas enjoined the auditor from carrying out said instructions, and this, its action, is assigned for error.

It will be seen that the question presented was whether or not the shares of stock held by the shareholders were subject to taxation, the corporation in which the shares were held having returned its property for taxation. In the course of its opinion the court said:

> The Toledo and Wabash Elevator Company is incorporated under the laws of Ohio, and whether or not the property which it was thus required to list for taxation embraced its capital stock within the meaning of the statute, is the principal question arising upon the record.
>
> That it did embrace it we entertain little doubt. The capital stock of the corporation consists of the money and property subscribed and paid in for the purpose of carrying on its business operations. It constitutes a corporate fund belonging to the corporate body. The ownership of a share of stock involves the right to participate in the dividends declared from the profits of the business, and upon the dissolution of the corporation to a proportionate share of the fund remaining after payment of the corporate debts. This interest or right, however, does not enable the shareholder to withdraw any portion of the capital stock of the corporation from its control, nor to exercise any authority over it, further than to participate, to the extent of his stock, in the election of a board of managers, charged with the conduct of the business for which the corporation was created.
>
> The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully, within the meaning of the statute, after it has been converted into property necessary for its business operations, and for which it was subscribed, as before. *Bank Tax Case*, 2 Wall. 208; *Farrington* v. *Tennessee*, 95 U. S. 686. For the purposes of taxation, the capital stock is represented by whatever it is invested in. Personal property, by the express wording of the statute, is made to include the capital stock of a corporation; and the provision above referred to requires all corporations

doing business in this state, except banking and others whose taxation is specifically provided for, to list all their personal property, including in the return thereof all such real estate as is necessary to the daily operation of their business, together with their moneys and credits of every description within the state. That the legislature intended, by this description of property, to embrace the capital stock of the company is too obvious to be misunderstood. No other meaning can be drawn from the language employed, and no other construction is better calculated to do justice.

As was said by Mr. Justice Nelson, in the *Bank Tax Case* above cited, referring to the capital stock of a National bank: "The capital is not an idle, fictitious, arbitrary sum of money, set down in the articles of the association, but in theory and practical operation of the system, is composed of substantial property, which gives value and solidity to the stock of the institution."

It is, however, contended by counsel for plaintiff in error, that, inasmuch as the statute requires the shares of the stock in incorporated banks to be taxed in the name of the bank, and does not require the shares of stock in any other company to be taxed in the name of the company, it conclusively follows that shares of stock in incorporated companies, not engaged in banking, are to be taxed in the name of the owner.

Whether or not bank shares are to be taxed in the name of the banks, I shall not stop to consider, as it is quite obvious, that, as respects corporations of the character of the Elevator Company, the name in which the shares of the stock are to be listed and taxed is definitely ascertained by the statute. Except in cases where the capital stock is taxed in the name of the corporation, the shares are to be listed in the name of the person owning the same on the day preceding the second Monday in April in each year; but when the capital is required to be returned for taxation in the name of the company, the owner of the shares is expressly relieved from the duty to list them.

To give effect to the claim of the plaintiff, the court would be required to hold that the owner of shares of stock is required by the statute to list them for taxation in all cases where the corporation is not required to list its capital stock *eo nomine* The result would be that the owner would be required to list his shares in all cases, as the statute no where requires the corporation to list its capital stock, except as it is embraced within the description of the property it is required to return, and which description makes no mention of capital stock by name. The construction contended for would result in imputing to the legislature the folly of undertaking to create an exception which could have no possible operation. But such, we think, is not the effect of the statute. The property which the Elevator Company was required to return for taxation very clearly embraced its capital stock, and the action of the board of equalization, in adding $12,000 to the return of the defendant in error, was, therefore, wholly unauthorized.

It is respectfully submitted that the foregoing opinion contains a satisfactory exposition of the rule which we claim should be applied here. It is there held that, even in the absence of subdivision nine of section three, which was repealed by the act of 1878, and under the language of the old section fifty-nine, as carried into the act of 1878, the term "capital stock" means, not capital stock *eo nomine*, but the property *of the corporation* It is also there held that it was the intention of the legislature, in the language so employed, to exempt from taxation shares in a corporation which is required by law to return its *property* for taxation. It may be added that the act of 1878 required, as did section sixteen of the act of 1859, the listing of the property of corporations within the state, "whether incorporated by any law of the state or not," or "for whatever purpose created." Banking and other corporations whose taxation was specifically provided for were excepted. [Ohio Laws, Vol. 75, p. 445, Sec. 11.]

By the statute foreign and domestic corporations are placed in the same category. No distinction is made between them. Both classes are required to return for taxation their property within the state. In the instance in which "capital stock" is designated as the fund to be taxed, the Supreme Court holds that the legislature thereby meant the "property" of the corporation. In subdivision nine of section three, in force during the period in question here, this meaning is still more clear; for there the shares are made exempt where the corporation "is required to list or return its *capital* (not capital *stock*) and property for taxation in this state."

In the case cited, the company whose shares were sought to be taxed was a domestic corporation, and all its property happened to be within the state; but that makes no difference in the principle to be applied. The statutes of Ohio authorize corporations to be formed within the state to prosecute mining and other enterprises without the state. Most of the property of such corporations is located outside the state, and taxable where situated. But if, in obedience to the statute, it makes due return of its property "within the state," and pays the taxes assessed upon it, the shares of the stockholders are exempt from taxation And the same rule is to be applied to foreign corporations doing business and having property within the state; for, as before observed, the statute makes no distinction between them. The language of the act embraces and comprehends them all in the same provision. Both classes of corporations are required to make return of their property "within the state;" the same rate and rule of taxation is applied to each; and the same exemption from taxation is made as to the shares of each. And unless it is held that the shares in a domestic corporation shall be taxed in cases where a portion of its property is without the state, there is no warrant for holding that the shares in a foreign corporation are to be taxed in cases where a part only of its property is within the state. There are foreign corporations created to do business in Ohio, precisely as there are Ohio corporations created to do business outside of the state. Some of these foreign corporations have the bulk of their property within the state.

In construing the language of the statute exempting from taxation shares in a corporation which is required to "list or return its capital and property for taxation," and to show that the legislature did not mean by this language to require *all* the property of the corporation, whether within or without the state, to be returned, I desire to refer to the case of *Commonwealth* v. *Standard Oil Company*, decided by the Supreme Court of Pennsylvania. 101 Penna. St. Rep. 119. The facts in the case were as follows:

The Standard Oil Company was an Ohio corporation, having a capital originally of $1,000,000, increased in 1872 to $2,500,000, and in 1873 to $3,500,000. It never received special permission from the State of Pennsylvania to transact business therein. It, however, did transact business in Pennsylvania, and its real and personal property, situated beyond the state limits, exceeded in value the amount of its capital; its dividends were declared upon the amount of its nominal capital; it purchased in the State crude petroleum, which it sent beyond the state boundaries to be refined; from 1873 to 1878 it owned interests in individual partnerships dealing in oil in Pennsylvania, limited partnerships and Pennsylvania corporations. The acts under which the tax was claimed by the state were substantially as follows: 'The capital stock of all companies whatsoever, incorporated by or under the laws of this commonwealth, or incorporated by any other state and lawfully doing business in this commonwealth, * * * * shall be subject to and to pay a tax.' The court [below] held that the company was not liable to taxation on its whole capital, but only upon so much as was represented by property within the state; that it was not liable to be taxed for the purchases of petroleum, or by reason of its ownership of stock in Pennsylvania corporations or partnerships; that it was liable to a penalty and interest on the taxes due, and gave judgment for the commonwealth for $33,-270 59. Both the Commonwealth and the Standard Oil Company took writs of error. [Boston "Reporter," Vol. 15, p. 59.]

In the opinion of the court, delivered by Mr. Justice Paxson, it was said:

It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets. [Numerous cases are here cited in support of this proposition, including several in the Supreme Court of the United States.] Equally well settled is the principle that the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state; these subjects are persons, property and business. See *State tax on Foreign-held Bonds*, 15 Wallace, 319; *Maltby* v. *Reading & Columbia R. R. Co*, 2 P. F. S., 146; *McCullough* v. *State of Maryland*, 4 Wheaton, 316.

It is undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within this state. The act of 1868 (P. L. 83), to revise, amend, and consolidate the several laws regulating the licensing of foreign insurance companies, is such an act. It required a license, and imposed a tax; heavy fines were inflicted upon any such company doing business without a license, and it was made a misdemeanor for any person to act as agent or transact business for an unlicensed company A license tax is evidently intended as a compensation to the state for the protection which it affords foreign corporations who have an office within its borders, for the convenience of its officers, but upon whose property it could impose no tax because not within its jurisdiction. The tax in this case is in no sense a license tax. The state never granted a license to the Standard Oil Company to do business here. It merely taxes its property, that is, its capital stock, to the extent that it brings such property within its borders in the transaction of its business. It was contended on behalf of the commonwealth, and pressed with much learning and ability, that where a foreign corporation enters the state to do business, it brings its entire capital stock with it. This position is ingenious but unsound It is a fundamental principle that the person must have a domicile in the state in order to be taxed, and the thing must have a situs therein: *Hays* v. *Pacific Mail Co.*, 17 Howard, 596; *Morgan* v. *Parham*, 16 Wallace, 471; *St. Louis* v. *The Ferry Co.*, 11 Wallace, 423. Persons and property in transitu can not be taxed: *Hoyt* v *Commissioners of Taxes*, 23 N. Y. 224. The domicile of a corporation is the state of its origin: Potter on Corporations, Sec. 10; and it can not migrate to another sovereignty: *Bank of Augusta* v. *Earle*, 13 Peters, 586; *Paul* v. *Virginia*, 8 Wallace, 168; *St. Louis* v. *The Ferry Co.*, 11 Wallace, 423. The domicile of the Standard Oil Company is in the State of Ohio. Being a corporation it is an invisible, artificial, and intangible thing. When it sent its agents to this state to transact business, it no more entered the state in point of fact than any other foreign corporation, firm or individual who sends an agent here to open an office or branch house. A corporation must be considered as a person, an artificial one, it is true; and it would be as reasonable to assume that a business firm in Ohio brought its entire capital here, because it sent an agent here to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in this state to transact a portion of its business, thereby brought all its property or capital stock within our jurisdiction. There is neither reason nor authority for such a proposition.

To the extent that it brought its property here it is taxable, and no further. An act of assembly must have a reasonable construction. When it says "all" horses, "all" carriages shall be taxed, it does not mean all horses and all carriages in the state of Ohio. It refers to all such things as are within the jurisdiction of the taxing power. Regarding the words "capital stock" in the act of the assembly as the equivalent of the property and assets of the corporation, we must construe them to mean so much of the capital stock measured by the property actually brought within the state by the company in the transaction of its business. This construction is in accord with the practice heretofore existing in the auditor-general's office, and the repeated decisions of the courts.

When, therefore, the legislature declares that there shall be no taxation of shares in a corporation "which is required to list or return its capital and property for taxation," it means only such capital and property as is subject to its jurisdiction. This is made perfectly clear by the fact that under section sixteen of the statute, both domestic and foreign corporations *are only required to list their property "within the State."* *When the legislature directed in express terms, the listing for taxation of the property of foreign corporations within the State, and in like express terms exempted from taxation the shares of all corporations required to list its property for taxation, it surely was not guilty of the absurdity of intending to make the right to the exemption depend upon the listing by the corporation of more property than it was required to list.* It is contended upon the other side that the exemption applies only where *all* the property of the corporation is returned for taxation. The statute requires only that to be returned which is within the State; and this is true both of domestic and foreign corporations; so as to both classes, according to the claim made, in order to protect their shareholders, they must, although not required so to do, return all their property, no matter where situate.

It was suggested by counsel in argument below, that upon our construction, a tax upon the shares would be avoided if an inconsiderable amount of the property of the corporation were within the State. It is very easy to present extreme cases; but they should not interfere with the application of a sound general rule. We might say, in like manner, that upon the construction claimed by opposite counsel, if a foreign or domestic corporation had all its property within the State except some inconsiderable portion, and listed it for taxation, the shares would nevertheless be subject to taxation also.

The legislation exempting shares in corporations from taxation is in accordance with an enlightened public policy. Corporations of other States whose business promotes the interests and convenience of the public, are invited to come into the State; inducements to do so are held out to them. Railroad and telegraph companies are a great public benefit and convenience. The legislature, in the enactments under consideration say to these corporations, in substance: "If you bring into the State such property as is convenient and necessary to enable you to transact your business, upon that we will require you to pay taxes; but we will not require such of our citizens as encourage your enterprise by subscribing to or purchasing your capital stock, to pay taxes on their shares."

The cases of *Worthington* v. *Sebastian*, 25 Ohio St. Rep. 1, and *Bradley* v. *Bauder*, 36 Ohio St. Rep. 28, have been cited and relied upon on the other side. Neither of these cases touches the point in controversy. In both cases the stocks and bonds taxed were those of foreign corporations, having, as the facts reported show, no property within the State. In the Worthington case, the bonds held by Mrs. Worthington had been issued by a corporation of the State of Indiana, owning and operating a railroad between Lawrenceburg and Indianapolis, in that State. The stocks involved in the same case were stocks in a foreign corporation not doing business in Ohio, and having no property in the State, so far as appears in the case. The question presented and determined therefore, was simply as to whether or not the bonds and stocks of an exclusively foreign corporation were subject to taxation in Ohio.

The case of *Bradley* v. *Bauder*, was of the same character, and the decision was placed upon the same ground. This case, it may be remarked, arose under the act of 1878, which omitted subdivision nine, of section three, of the act of 1859. The following is from the statement of the case:

> This was an action brought to enjoin the auditor of the county of Cuyahoga from placing upon the duplicate for taxation, in pursuance of a direction from the board of equalization of the city of Cleveland, investments in the capital stock of corporations created in other states, owned by the plaintiffs, residents of this state. The corporations were railroad, mining, manufacturing and express companies, and each derived its franchises wholly from the state where it was located. *The petition avers that their capital stock is* ALL *invested in real estate and other fixed property situated in other states, where the same is annually listed and taxed, and where their entire business is transacted, and that* NO PART OF EITHER *is within this state, or subject to its jurisdiction.*

In stating the point to be decided, Judge Boynton, who delivered the opinion of the court, said:

> The sole question arising upon the demurrer to the petition, is whether the shares of stock in corporations created in other states, which shares are owned by persons residing here, are taxable under our constitution and laws, *where the capital stock of the corporation is invested in real and fixed property situated in the state in which the corporation exists,* and where, by the laws of such state, the same is required to be listed for taxation.

Since the foregoing cases were determined by the Supreme Court of the State, and the rendition of the judgment in this case in the court below, the Court of Common Pleas of Richland County, Ohio, construing the statute as claimed by us, has decided that shares in the Western Union Telegraph Company are not taxable in the hands of a citizen of Ohio. *Lee, Treasurer* v. *Edward P. Sturges; March Term, 1884, per Dickey, Judge.*

III.

The Circuit Court erred in its conclusion and judgment that the Auditor of said county of Richland was authorized by the laws of Ohio in force at the time of said assessment, to assess a tax upon said shares of the capital stock of said Western Union Telegraph Company for any year prior to the year 1878.

This is the sixth assignment of error, and is intended to present the question as to whether or not the act of 1878, under which the supplemental assessment was made, is retrospective in its operation.

It was not until the passage of the act of 1878 that the county auditor was permitted to go back and disturb assessments and settlements of previous years. 1 Swan & Critchfield's Stats. 1452, section 34; Swan & Sayler's Statutes, p. 759, Sec. 15. The act of 1878, authorized the auditor to go back for a period not exceeding four years. Ohio Laws, Vol. 75, pp. 456-7, Sec. 48, 49; Revision of 1880, Sec. 2781, 2782. But was it intended by this enactment to permit him to interfere with settlements that had been made prior to its date?

Before the passage of this act all corrections were to be made before the settlement of each year between the treasurer and auditor, and the accounts of the treasurer were to be verified by the settled duplicate. Take all the taxes sued for, and as the law stood on the day of the settlement between the auditor and treasurer in each year, which was on or before the 10th day of August, the whole matter of taxation was determined. If the State had wrongfully assessed too much, the citizen was barred; if the citizen had listed too little, the State was barred. It is not reasonable to suppose that it was the intention of the legislature to disturb these settlements.

The general doctrine applicable in such cases is thus stated by Mr. Smith in his work on Constitutional Construction, sec 149.

> Under this head it may be well to consider the power of the legislature, independent of any constitutional restrictions, to pass *retrospective* laws which shall have a *retroactive* effect. At this point the question arises, what is a retrospective law in the sense which in this connection we use the term? Retrospective laws are not confined to such as are enacted to take effect at a time anterior to their passage; but this term embraces all statutes which, though operating only from their passage, affect vested rights and past transactions. It would be a construction utterly subversive of all the objects of an implied inhibition upon legislative power in this respect, to confine it to statutes which were to take effect anterior to their passage. It would enable the legislature to accomplish that *indirectly*, which we are now contending it can not do *directly*. Upon principle, every statute which, as to the citizen, takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

The concluding clause quoted is taken from an opinion delivered by Mr. Justice Story in a case reported in New Hampshire. See, also, Dwarris on Statutes, by Potter, p. 472.

In the case of *Bernier* v. *Becker*, 37 Ohio St. Rep.

72, 74, White, J., in announcing the opinion of the court, said:

> It is laid down as a rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intent that it should operate retrospectively. Cooley's Con. Lim., 370; Broom's Legal Maxims, 35.

The same doctrine is tersely stated in the case of *Dash* v. *Van Kleeck*, 7 John. 477, 478:

> It is a principle of universal jurisprudence that laws, civil or criminal, must be prospective, and can not have a retrospective effect.

From this view of the proper rule of construction it results that when the auditor, in the year 1878, shortly after the passage of the act in question, undertook to make a supplemental assessment of taxes for the years 1874, 1875, 1876 and 1877, he exceeded his powers, and his action in that respect is illegal and void.

IV.

The Circuit Court erred in its conclusion and judgment that a penalty had accrued and was chargeable upon the additional taxes assessed by said county Auditor against said Stephen B. Sturges; and that interest was chargeable upon said taxes.

This is the seventh and last assignment of error.

1. Even assuming that the shares were taxable, and that the statute of 1878 is to have retroactive effect, there is no warrant for adding a penalty of ten per cent. upon the taxes assessed. The auditor

is authorized, upon ascertaining the amount which the tax payer should have returned, to add fifty per centum thereto, but he is *not* authorized to add a penalty to the taxes assessed thereon. The act expressly provides that, as to former years, "no penalty shall be added, and only *simple taxes* shall be claimed." 75 Ohio L., p. 457, sec. 48. Penalties are only chargeable where the taxes have gone regularly upon the duplicate, and there has been a default of payment. Here, the act took effect July 1, 1878. The assessment was made within a few days thereafter, and the action was brought on the 17th of the following month.

2. Neither does the law allow interest upon unpaid taxes. The statute does not provide for it, and certainly it can not be recovered unless given by statute. In the case of *Bridge Company* v. *Mayer*, 31 Ohio St. 317, the Supreme Court of Ohio held that interest is not recoverable upon delinquent taxes. The same point was ruled in *Danforth* v. *Williams*, 9 Mass. 324.

For all these reasons it is respectfully submitted that the judgment of the Circuit Court should be reversed, and the case remanded with instructions to render judgment upon the agreed case and special findings of fact in favor of the defendant.

C. H. SCRIBNER,

Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

STEPHEN B. STURGES,
Plaintiff in Error,
vs.
MERCHANT CARTER, TREASURER,
Defendant in Error.
No. 217.

IN ERROR TO THE CIRCUIT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF OHIO. BY THE DEFENDANT IN THE SUIT BELOW.

Brief for Plaintiff in Error.

THE CASE.

This was a suit brought by the treasurer of Richland County, Ohio, against S. B. Sturges, then a resident of said county, in the State court, to recover taxes assessed on personal property for the years 1874–75–76 and '77, under sections 2781 and 2782 of the Revised Statutes of Ohio, revision of 1880, and found at pp. 24 and 25, C. H. Scribner's brief; also for the plaintiff in error for convenience referred to.

Pending the suit Sturges became a citizen of New Jersey, and on his application the case was removed into the Circuit Court of the United States.

The proceeding was the civil action of the Ohio code with special answer and special replication, which last the Ohio code does not authorize.

By stipulation, the facts were agreed upon, a jury waived, and the case tried by the court.

The plaintiff below offered some parol evidence on the trial, and exceptions were taken.

The court made findings of the facts and rulings of law, adjudging the defendant below to pay the plaintiff below the sum of $10,727.65 taxes for said years upon $100,000 worth of the capital stock of the Western Union Telegraph Company.

The court found nothing due on credits, also sued for.

Sturges took exceptions and brought the case to this Court on error.

The treasurer acquiesced in the judgment of the Circuit Court.

The sole matter for discussion and judgment here is, whether the stock of the Western Union Telegraph Company, owned by Sturges, was legally assessed in manner and form as the Ohio authorities assessed it.

Assignment of Errors.

The Court erred in holding that the tax on said stock was legally assessed by the Auditor of Richland Co.

This involves three several and distinct errors:

First. The Court erred in not holding that the law under which said assessment was made, was retroactive and therefore void, under the 28th Sec. Article II. of the Constitution of the State of Ohio.

Second. The Court erred in holding that the Auditor pursued the statute in his assessment. In this; he acted without first giving the plaintiff in error notice of his intended action, and hence, had no jurisdiction of the case.

Third. The Court erred in holding that said W. U. Telegraph stock was taxable, in the hands of the plaintiff in error, under the statute of Ohio.

The assignment of errors of our associate, Mr. Scribner, at page 19, states these propositions more nearly in the form of plaintiff's motion for a new trial in the court below.

We ask attention to his exhaustive and very able presentation of our side of the case.

Our assignment of errors seems to us to follow the natural and convenient order of the case itself.

I.

The tax was for the years 1874, '75, '76 and '77. The answer alleges that for each of these years, the plaintiff in error made his return, which was accepted, his property assessed, and the tax paid. (Rec., p. 8.) This is admitted to be true by the defendant. (Record, p. 15.)

The act under which the suit was brought, passed —— 1878, in terms authorized the Auditor to go back four years. As to this law, and the time of the Auditor's action under it, July, 23, 1878, each of these years was a past and closed transaction, and just how a going back, re-opening and re-adjusting each, and adding to the property owner's burdens, is not retroactive, is not apparent to the common mind.

It should be borne in mind, that section 2782, was but a re-enactment of the 34th sec. of the Act of April 8, 1865. (See tax laws of Ohio, prepared by the Auditor of State, 1872, p. 15.) So that the remedy of opening and revising the returns of each year, by the summary judicial process, was in active life, and the Auditor was fully armed with it. Yet each year is past, each transaction closed, under the eyes of the alert enquiring Auditor, until this new law, and instruction from another State officer, come in to overturn, revise, and supplement.

Observation:

Property is, to a certain extent, a creature of the law, as are the owner's rights and titles to it. There are some things, however, which the law itself presumes that the law will not do. Among them, that the owner shall not be divested without its own legal well-known course and sanction. Property shall not bear a double burden of taxation. A past transaction shall not be re-opened, save by conventions of the parties.

Taxation is a pure creature of positive law, and while equitably all property should share the burden of its own and its owner's protection, the right to coerce its contribution flows alone from the expressly declared will of the legislator, and that will must be strictly construed. There are no intendments or presumptions in its favor. Under constitutional limits, the legislator has his will in the premises; and it is not an unreasonable rule in favor of the property-owner, that he and his property should have all the reasonable intendments of the common law in his favor. The matter of exemptions will arise later.

The general practical rule of contribution is, an annual assessment, for the public revenue. Each year, is its own demand, occasion, and opportunity.

If, through want of care, skill and prudence of the taxing agencies of the government, property escapes for the year, it has escaped wholly. This grows out of the universal rule of annual assessment. It never has been pretended, in the absence of express statute, that the taxing power could thrust its hand back and gather its unassessed dues from the grave of the past year. It is clear that where a tax is a lien on the property itself, this can not be done. It is equally clear that as to personal property, the subject of daily transfer, by delivery, this should never be attempted.

Whenever it is attempted, it is found that the remiss taxing power seeks to charge the consequences of its own carelessness or ignorance upon the property owner. In the first instance, it gives its assessors and auditors inquisitorial powers, with the right to summon and compel the attendance of witnesses. It denounces fitting punishments for fraud and false swearing on the property owner, and now seeks, in this case, to cast the cost and burden of its own want of care and skill in the framing and execution of its tax laws upon the property owner, to the extent of going back four years, reopening, reviewing and revising its own settlements, of its own demands. On principle, this ought not to be permitted.

There is but one class of cases where these annual assessments, payments, and settlements, should or can ever be impeached by the State. That is where they have been procured by fraud, on the part of the property owner. This is the basis of section 2781, which authorizes this retroactive right and remedy to the State. That provides that it should arise only in cases of fraud.

If the "person whose duty it is to list property, or make a return thereof for taxation," "*shall make a false return or statement; or shall evade making a return or statement*," the county auditor in his work of revision "may go so far back as the same can be traced, not exceeding four years." And it denounces a severe penalty, conclusive that it is a fraud that warrants this retroaction.

The proceedings by the Auditor of Richland County, where he assesses the W. U. stock for the four preceding years, makes not the slightest pretense that the non-return of this stock was fraudulent. The return was neither false nor evasive. (Rec., pp. 18–19, &c.) To assume now, that this was the ground in the absence of any pretence, is to deny the presumptions and intendments of the law itself.

The section of the Ohio statutes under which the suit was brought, obviously was not framed for the purpose of a suit of the nature of this. It cannot be said to contemplate a case for fraudulent practices. If it allows such an action, it dispenses with the most material allegations of a count upon fraud.

If it shall be held that it authorizes such an action, and does dispense with the charge of fraud, as its gravamen, it certainly does not excuse proof of fraud, as a condition of conviction and judgment against the defendant in the case.

Was this in any way, under any rule, a suit to recover for fraud, as contemplated by Sec. 2781? Turn to the petition (p. 3, Rec.), that merely alleges that Sturges stood charged with a specific amount of taxes on the duplicate, and they are due and unpaid : not the slightest intimation that he fraudulently withheld property from assessment. The case by itself is well enough under the statute, but does not cover the case for the remedy under Sec. 2781.

On turning to the reply of the treasurer to the answers, he says that the auditor found that the W. U. stocks were *falsely* omitted from his returns. (Rec. p. 16.) This cannot help. It is false in fact. It is not an averment of fraud. It could not be brought into the case in this way, if it was.

When we turn to the agreed facts of the parties, the finding of facts by the Court, and the proof given at the trial below, which the Court will not examine, we find not an intimation of a suspicion of fraud on the part of the plaintiff in error.

We have here then a statute, authorizing a re-opening of the annual assessments and payments of taxes for four years, where the State had been defrauded of a just assessment by the false practices of the property owner; and a suit brought, and sustained, for the sums thus fraudulently withheld, in which no intimation of fraud is made, in the plaintiff's count, and none in his proof, and when it is made to appear, that no fraud in fact existed in the mind of the plaintiff in error.

We are thus remitted to the bald question: Is not this statute, if the construction of it by the Court below was sound, that it authorized the suit, directly inhibited by the 28th Sec., Article II. of the Ohio Constitution? "The General Assembly shall have no power to pass retroactive laws," &c.

That this is "acting backward, or upon something past, preceding," is the unanimous definition of lexicographers and legists.

II.

Section 2783 confers limited judicial powers upon the county auditor, to hear and determine the question of misconduct by the property owner, or questions of omissions by the assessor. He is a tribunal in whose favor there are no intendments or presumptions of law. He, and those who claim under him, must show that the conditions confering jurisdiction, as well as the prescribed procedure, concur and have been observed, or his action and judgment in a given case are invalid.

The section declares:

> It shall be the duty of the auditor in all such cases to notify every such person (sought to be charged), before making the entry on the tax-list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct.

The declared purpose of the notice shows its importance. It is a condition precedent of jurisdiction and validity. It is not merely to notify the property owner that he has been or will be further taxed, so that he may be prepared to pay; but it is in the nature of a rule to appear and show cause, against an accusation of fraud on his part, or official misconduct on the part of the assessor. He must not only be brought into court, but he must be notified what the purpose is for which he is called there, with time and opportunity to prepare for a trial of the matter so notified to him.

Recur to the record and see what was done by the auditor on this most important point.

On page 18 will be found Exhibit K, there euphoniously called a *notice*, which the auditor, who issued it, did not regard as a notice at all, did not issue it as such, and does not call it a notice. He calls it by a name which accurately implies the sole office it can perform; not a summons to bring in a party, but a "*subpœna*" to bring in a witness. (Rec., p. 28.)

He calls this K a subpœna. So the court below calls it a subpœna. (2d par. Findings of Fact, Rec., p. 33.)

This was no notice. It was a subpœna. It assumes that suit is pending, the defendant properly in court, the trial at hand, and a witness is wanted at the hearing.

What actually did occur was, the auditor, who regarded himself as competent to try his wholly *ex parte* case, had occasion to call the plaintiff in error before him for his own purpose as a witness; remarked to him casually, and as a matter of no significance, that he had *been instructed from the Auditor of State* to tax him, and he proposed to do it. (Rec., p. 28.)

He did not then think any notice was necessary, and he gave none. His record shows nothing that he claimed as a notice.

It was only when the court below was pressed to desperation to sustain this unauthorized action of the auditor, that it seized upon these words and, in effect, judicially transposes and elevates the observation of the judge on the trial, to a summons to the party to appear, have his day in court, make up his issue, and actually appear and defend All these effects the court caused to flow from these words. (See 2d Conclusion of Law, Rec., p. 34.)

We say this was flagrant error; yet when we see the same court finding the plaintiff in error indebted to the County of Richland for a sum not sued for, we are not greatly surprised at this conclusion. Why it hesitated to render judgment for it, is not apparent. It had the same jurisdiction over it as had the county auditor, of the plaintiff in error, and by the same process—a casual conversation.

A word further of this matter.

M. D. Ward, auditor, said:

> "Mr. Sturges came in after notice here read; I exhibited the testimony I had from the recorder and clerk, and testimony of Jones and others, and I told him *I proposed to tax him; that I had such instructions from the Auditor of State. . . . I told him then I should put the Western Union Stock on.*" (Rec., p. 28.)

And he did then and there.

The Court below found this occurred on the day of the date and service of the subpœna (1st finding of fact, p. 33.)

Did he offer Sturges time to prepare and defend? Not at all. That was useless. *He had already decided it*, and merely announced his judgment. It was already determined before he spoke of it, and his mentioning it had nothing in the world to do with its validity. It was a past transaction.

Worse than that—it was not his work at all. It was the work of the State Auditor. What had he to do with it, with or without notice? He instructed the county Auditor, who merely recorded his decision.

As showing that it was then thought that Sturges had no business with this matter, the trial, the Auditor says, "I showed him the testimony of Jones and others," which he took without notice to Sturges, and in his absence.

Of course he gave no notice under the statute. Sturges had no hearing or opportunity to be heard.

The proceeding must be held a nullity.

This thing of notice, its purpose and character, was adjudicated by the Supreme Court of Ohio, in the case of the *Bank* vs. *Smith*, 7 Ohio State Rep., p. 42, which is wholly with us (see Opinion, p. 49).

III.

The main question—was the **Western** Union stock taxable under the Ohio Statutes, in the hands of the plaintiff in error? We reach the solution of this, not by finding the meaning of the Ohio laws for ourselves, but by finding out what the Ohio Supreme Court says it was, which is a different thing.

One or two things may be premised of the matter involved.

There is no idle fund set apart as the capital stock of a corporation distinct from its property. Usually, every dollar of it is invested in property—offices, machinery, implements, real estate, and fixtures actually used in its working processes, so that capital stock and property are convertible terms. They are both found in the Ohio Statutes and are decided to be equivalents. So says Mr. Justice Boynton, for the Court, quoting Justice Nelson, of this Court, in the Bank tax cases (2 Wall, 208), *Jones, Auditor* vs. *Davis*, 35 O. St., 474. See also *Farrington* vs. *Tennessee*, 95 U. S., 686.

It does not seem material whether you call stock a debt due from the corporation to the stockholders, which it is not in any sense, or money of the stockholders in the hands of the corporation as their agent, which it is in fact. It is settled for our purpose, that the capital stock of the corporation is the property of the corporation, and its property is its capital stock.

Nor is it material to distinguish between the stock, and shares of the stock, as is so shadowily done in the Farrington Tennessee case by Justice Swayne. The case of *Jones* and *Davis* meets our aspect of this case, a construction of the Ohio Statutes by the Ohio Supreme Court.

So we may say that the Ohio Statutes declare against double taxation—that is, taxing property in the State twice; a construction which violates this rule, should be revised. This principle is declared in subdivision 9, Sec. 3d, Act of April 5, 1859.

> No person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital stock or property for taxation in this State.

It makes not the least difference what this Court may say abstractly of capital stock of the corporation and shares of the same stock in the hands of subscribers to it. This statute says they are alike property in the hands of both, and declares that where the corporation is required to return it for taxation, the stockholder shall not be required to return it, because that would tax it twice.

It is true this 9th paragraph is found under the head of exemptions from taxation, which is an erroneous classification. It is in no sense an exemption. It is a needful provision against double taxation, with all the intendments of law in its favor, and not against it, as urged by the defendant in error.

The findings and rulings material to this question are:

a. The plaintiff in error owned $100,000 Western Union stock not returned by him.

b. The Western Union was a corporation of New York, owning a large amount of property in Ohio.

The Statute of Ohio required the company to return this for taxation there, which it did, and paid some $15,000 per annum tax on the same.

In the light thus gained, how fares our proposition, which now may be more accurately stated?

All the property of the Western Union Telegraph Company in Ohio having been taxed in the name of the corporation, has the Supreme Court of Ohio authoritatively decided that it can again be taxed in the hands of the plaintiff in error?

The cases are not numerous, nor do they seem difficult of apprehension.

The case of *Worthington* vs. *Treasurer of Hamilton County*, cited on the other side of this case, was to enjoin the collection of a tax on the bonds of the Ind. & Cin. R. R. Co., which owned and worked a road between Indianapolis and Lawrenceburg, also in Indiana. It owned no property in Ohio, was required to return none there for taxation.

The contention was that the debtor corporation, having its domicile in another State, its bonds could not be taxed in the hands of a holder domiciled in Ohio. 25 Ohio State Rep., p. 1.

The court held they could be. It is not seen how this bears materially on our proposition.

Jones, Auditor, vs. *Davis*, 35 Ohio State, already cited, to establish that the property of a corporation is its capital stock, is instructive on the main question.

Davis owned 200 shares of the stock of the T. & W. Elevator Co., doing business at Toledo, Ohio, and which returned its property as required. The effort of the auditor was to tax these shares in the hands of Davis also. The court refused it, because they were taxed in the name of the company. This goes to the extent of declaring that under the Ohio Statutes the capital stock of a corporation taxed in its name is identical with certificates of stock in the hands of an owner.

See, also, *Salt Co.* vs. *Treasurer of Meigs Co.*, 21 O. St., 555.

Bradley vs. *Bauder*, 36 O. St., 28, is confidently relied upon by the defendant in error, as the case deciding, that although the Western Union Company has returned and paid taxes on all its property in Ohio, still its stock, owned by Sturges, is also rightfully taxed there.

The question decided in this case is the same decided in the Worthington case, and no other.

It is true the brief of the defendant in error asserts that the petition in this case sets out, that one of the corporations whose stock its owner sought to protect, owned property and paid taxes on the same in Ohio, making it identical with this case. If so, that feature and the question which might have been made, was not raised, nor in any way passed upon.

The statement of facts, is, that all the property and all the business of the corporations were situate in the States incorporating them. "That no part of either is within this State or subject to its jurisdiction.". (3d paragraph of statement.)

Judge Boynton, who pronounced the opinion, declares the sole question is whether shares of stock, owned in Ohio, of corporations created by other States, where all their property is situate and taxed, can be taxed in Ohio.

The Court decides that it can be.

This is not our case, nor has our question been decided by the Supreme Court of Ohio.

It is true Judge Boynton says that the companies and corporations named in the 9th paragraph of section 3d, must have their *situs* in Ohio; but that question was not before him. The exemption from taxation was not claimed by Bradley, because the property and capital stock of the corporation were required to be returned by them, and taxed in Ohio. He admitted they were not; could not be. He claimed exemption because they were returned and taxed in the States creating them.

So the learned judge seems to have lost sight of his decision in *Jones* vs. *Davis*, that capital stock in the hands of the defendant, and capital stock of the company, were identical; for he now holds that the properties are distinct species of property (Id., p. 36.)

It is shown that the Ohio courts, since this decision, have held that W. U. stock owned in Ohio, was not taxable in the owners hands. (See Mr. Scribner's brief, p. 50 which we trust will receive the attention its great merits entitle it to.)

Clearly the Circuit Court erred in holding that the statutes of Ohio as construed by its Supreme Court, required that the W. U. Telgraph stock owned by the plaintiff in error, should be returned by him for taxation.

And it is clear, under the findings of fact by that Court, that the 9 paragraph of the 3d section of the Act of April 5, 1859, expressly dispenses with such return.

And that the judgment of the Circuit Court must be reversed.

ALBERT G. RIDDLE,
HENRY E. DAVIS,
JAMES. E. PADGETT,
For Plaintiff in Error.

PHILADELPHIA
BAR
ASSOCIATION

JAN 26 1938

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SUPREME COURT OF THE UNITED STATES.

No. 217.

STEPHEN B. STURGES, PLAINTIFF IN ERROR,

vs.

MERCHANT CARTER, TREASURER OF RICHLAND COUNTY, STATE OF OHIO, SUCCESSOR IN OFFICE TO JOHN A. LEE, TREASURER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

ARGUMENT OF
JOHN W. JENNER AND ANDREW SQUIRE,

Of Counsel for Defendant in Error.

SHIELD AND BANNER PRINT, MANSFIELD, OHIO

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It will not be necessary for us to make a statement of the case, as counsel on behalf of plaintiff in error has made a lengthy statement, and we think substantially correct. We will, therefore, confine what we have to say to the argument of counsel, based upon the assignments of error, considered by him in his printed argument.

I.

It is claimed (printed argument p 20) by counsel for plaintiff in error that:

"No sufficient notice was given by the Auditor of Richland county, under the Statute of Ohio, to entitle him to assess additional taxes against the defendant Sturges. The Circuit Court erred in ruling that the notice given was sufficient, and in admitting the parol evidence objected to by the defendant."

Under this head he considers the first four assignments of error. We will endeavor to reply to the argument of counsel in the order in which he has presented the same in his printed argument.

The statute providing for notice, and by authority of which the Auditor made the inquiry and corrected the returns of plaintiff in error, for the years 1874, 1875, 1876 and 1877, will be found in the Revised Statutes of Ohio, Sections 2781 and 2782, as follows:

SECTION 2781. If any person whose duty it is to list property or make a return thereof for taxation either to the assessor or to the county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, to which amount he shall add fifty per centum, and place the same on the tax list; and the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and corrections are made, but as to former years no penalty shall be added, and only simple taxes shall be claimed.

SEC. 2882. The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, money, or credits investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed, at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return; and it shall be the duty of the Auditor, in all such cases, to notify every such person, before making the entry on the tax list, and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct; and the county auditor shall, in all such cases, file in his office a statement of the facts, or evidence upon which he made such corrections; but he shall in no case reduce the amount returned by the assessor without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor.

> In all cases in which any person shall make a false statement of the amount of property for taxation, to evade the payment of taxes, in whole or in part, the person making such false statement shall be liable for, and pay all costs and expenses that may be incurred under the provision of this section, and the same fees and costs shall be allowed and paid as are now, or may be allowed by law, for similar services, and if not paid, may be collected before any justice of the peace of the proper county, by suit in the name of the county commissioners, but in all cases under this section, where the statement shall be found correct, and no intention to evade the payment of taxes, the costs and expenses incurred under this section shall be paid out of the county treasury of the proper county, on the order of the county auditor.

It will be observed that no prescribed form of notice is provided for by the statute, nor is it required to be in writing. The language of the statute is:

> And it shall be the duty of the Auditor, in all such cases, *to notify every such person, before making the entry in the tax list and duplicate,* that he may have an opportunity of showing that his statement or return of the Assessor is correct.

The Auditor of Richland County, proceeding under said sections of the statute, on July 23, 1878, caused a written notice to be sent to Mr. Sturges, requesting him to appear at the Auditor's office in Mansfield, Ohio, on said day "*to give information as to any property, goods or chattels in said county,* *which has not been listed for taxation, as provided by law*," which written notice was signed by the Auditor. (See Exhibit K., Record pp 18–19.)

In obedience to said notice Mr. Stephen B. Sturges appeared at the auditor's office on said 23d day of July, or the day following, and he was shown by the auditor the testimony he had already taken of Mr. Jones and others, as to the amount of stocks he (Sturges) was said to be the owner of, and also a copy of the mortgages in the recorder's office, and the list of judgments in the clerk's office, in favor of said Sturges, was shown to him, and the auditor then informed Mr. Sturges that under the advice of the auditor of state he intended to tax his stocks and credits. The Auditor testified as follows: (Record 38.)

> I showed the Statute to him; I asked him as to the amount, and wanted him to correct it if there was anything wrong about it.

Exhibit B, (Record 30) gives a list of the mortgages, in favor of Mr. Sturges, not released on the records of Richland County. The amount aggregated $15,950, and Exhibit A, (Record 30) shows the judgments, unpaid, in favor of said Sturges, as judgment creditor, on the judgment records of the Court of Common Pleas of Richland County, Ohio, at the date of the investigation, and to which lists Mr. Sturges' attention was called by the Auditor.

The aggregate amount of these judgments was $86-855.75, not including interest thereon.

The plaintiff in error was known to be a man of large means, represented by judgments and mortgage securities, stocks, bonds and ready money, and yet the tax lists returned by him for the years 1874, 1875, 1876 and 1877, (Exhibits M, N, O, P, Record 20 and 27) fail to show a return of any such property. And the total amount of property returned by him for said years was as follows: 1874, $2.-515; 1875, $2,550; 1876, $2,095; and 1877, $1,915. It would seem from a comparison of the list of property returned by Mr. Sturges for taxation, and his apparent ownership of mortgage securities and judgments, exceeding in the aggregate $100,000.00, to say nothing about his moneys and stocks, that the Auditor had reason to believe that Mr. Sturges had "omitted or made an erroneous return of property, moneys, or credits, investments in bonds, stocks, joint stock companies or otherwise, which are by law subject to taxation." And Mr. Sturges ought to have given to the Auditor a candid and full explanation of the returns he had made to the assessor, when the opportunity was offered him, if his returns could have been honestly shown to have been correct in his testimony before the Auditor. He says (Record 19):

> At close of the current year I owned something less than a hundred thousand (par value) of L. S. & M. S. R. stock. The cash value of what I owned of L. S. & M. S. R. R.

was somewhere from thirty-five to forty thousand dollars. Before I may have owned of the Western Union Telegraph stock at sometimes during the four years, worth something over one hundred thousand dollars in cash.

As to the amount due him on the judgments and mortgages, he says in very general terms (Rec. 19):

> I *judge* to be something less than $45,000.00. My debts I *estimate* at from $60,000.00 to $70,000.00.

As to moneys on deposit with banks or others, he answers:

> I don't know of any such credits.

The auditor in his testimony in the United States Circuit Court, states (Rec. 28):

> I told him (Sturges) there that I should put the Western Union stock on, and he said he had $100,000.00 of stock each year, Western Union stock. As to credits, he told me what is in the paper. He made pencil corrections on margin of credits.

The learned counsel for plaintiff in error maintains that the notice to Mr. Sturges ought to have been as formal as a summons, so as to give the party his day in court. If all that is claimed as to the construction of statutes of this class be admitted, does the conclusion he arrives at follow? We claim it does not. There is no language in the statute that can fairly be construed to mean that the notice must be in writing, or of the formal, certain and definite character insisted upon. The notice provided for was not to be given by a judge, or one learned in the law, or familiar with the formalities of legal proceedings, but by the auditor of a county, who assumes the duty without any previous special education or training for the place. It is only fair to presume that the class of men generally selected to fill the office of auditor was well known to the Legislature, and if it had been the intention to require more than an ordinary informal notice, the kind of notice would have been definitely prescribed.

The case of *The Champaign County Bank vs Smith*, 7 Ohio St., 42, cited on behalf of plaintiff in error, certainly does not support the proposition of counsel, that the notice ought to have been in writing, and must have been definite and containing within itself all that the statute contemplates. The language of the statute requiring the auditor to notify the person before making the entry upon the duplicate, was identical in the above case with that in section 2782. The facts of that case (7 Ohio St. 42,) show that the entry was made on the duplicate by the auditor "*without the knowledge or consent of the company.*" And the court, in the opinion, say (page 49):

> We cannot regard the provision of the Statute requiring notice, as *directory* merely. It is not a matter of form only, but of substance.

That is, a notice of some kind should have been given by the auditor before making the entry on the duplicate.

One of the propositions of the syllabus in that is as follows;

> But such statement and tax cannot be increased without first giving notice to the bank, and affording it an opportunity of showing that the statement of its officers was correct." (Page 42).

We never made the claim that Mr. Sturges' tax could have been increased without notice to him and a fair opportunity afforded him to show that his returns to the assessor were correct. But we claim that such notice was given him. He appeared in his own time and made a careful examination of the evidence filed in the auditor's office; made such explanations as seemed best to him; was then informed by the auditor of his intention to make the entry on the duplicate. And the finding of the Circuit Court was according to the undisputed facts. If all the learned counsel claims were true; if the notice should have been in writing and as specific and formal as a summons issued out of a court of record, (which we do not admit) yet we claim the appearance of Mr. Sturges waived any informality or irregularity as to the notice, indeed obviated the necessity of any notice. That question has frequently been decided in the courts. It was so decided in *Evans vs. Iles*, 7 *Ohio St.* 233. There would be some force to the argument of counsel if it could be made to appear that the notice was so uncertain that Mr. Sturges was not advised as to the object of it, or the intention of the auditor, and therefore neglected to appear, and the opportunity was not offered him to show that his returns to the assessor were correct. Not only is no such claim made on behalf of Mr. Sturges, but he admits that he was the owner of the $100,000 Western Union Telegraph stocks for each of the years, as charged against him, and in addition to that, $100,000 in money upon which he never paid taxes. And it is admitted that he made no return of said stocks or moneys for either of said years for taxation. and yet it is claimed in his behalf that by reason of the notice to Sturges being somewhat informal or less explicit than it should have been, he has suffered damage.

It is also claimed that the petition filed by the Treasurer in the Court of Common Pleas of Richland County, Ohio, was not sufficient. The statute provides for the form of the petition, and is in these words:

> And it shall be sufficient, having made proper parties to the suit, for such Treasurer to allege in his bill of particulars or petition, that the said taxes stand charged upon the said duplicate of said county against said person; that the same are there and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate.
>
> —*Revised Stats. of Ohio, Sec.* 2859.

If the additional taxes were properly placed upon the duplicate when so placed there, the said section would regulate the collection of the same. The learned counsel for plaintiff in error suggests no other section of the statute providing for a different form of pleading in this class of cases. The form of the petition did not make the proceedings summary. Mr. Sturges was regularly summoned, interposed his motion and demurrer, and thereafter filed a lengthy answer, and more than three years elapsed before judgment.

It is also said on behalf of Mr. Sturges that (Mr. Scribner's brief, 22):

> Plaintiff admits that at the commencement of this suit said taxes and penalties did not stand charged upon the respective tax duplicates of said Richland county for the years 1874, 1875, 1876 and 1877.

The inquiry was made by the Auditor in July, 1878. He was authorized to go back for a period of four years, prior to said year, 1878, in making the inquiry and corrections:

> The County Auditor shall ascertain, as far as practicable, the true amount of personal property, moneys, credits and instruments that such person ought to have returned or listed, to which amount he shall add fifty per centum, *and place the same on the tax list*, and the inquiry and corrections provided for in this, and the next section, may go back as far as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and conditions are made, but as to former years no penalty shall be added, and only simple taxes shall be claimed.
>
> *Revised Stats, of Ohio, Sec.* 2781.

The tax-list, or duplicate, for said years 1874, 1875, 1876 and 1877, had been settled up and passed out of the hands of the treasurer, and the auditor could not make corrections on them, nor could he correct the tax duplicate for the year 1878, by altering or inserting any figures, after the same was placed in the hands of the Treasurer. And it had been placed in the hands of the Treasurer at the date of the inquiry. But section 1038 (Revised Statutes of Ohio) provides that the auditor shall keep a book of "additions and deductions," in which he shall enter all additions to the duplicate; after it has been placed in the hands of the Treasurer, it then goes into the Treasurer's duplicate by means of a certificate from the auditor.

The additions made to the taxes of Mr. Sturges by the Auditor were made on July 25 or 26, 1878. The final settlement with the Treasurer was April 10, 1878. It first went onto the book of additions and deductions, and then onto the Treasurer's tax duplicate. By certificate of the Auditor it was placed on the duplicate of 1878, and not on the duplicates for the years 1874, 1875, 1876, and 1877.

See Auditor's testimony (Rec. 28).

Exhibit "A" is a copy of the additional property of Mr. Sturges entered by the Auditor on the book of additions and deductions for taxation for the years 1874, 1875, 1876 and 1877.

Exhibit "G" is a copy of the said property as certified by the Auditor to the Treasurer.

And Exhibit " I " is a copy of the Treasurer's duplicate showing said additional taxes. See stipulation as to facts. (Record 30.)

The provisions of the several sections of the statute were carefully complied with by the Auditor.

II.

The fifth assignment of error, counsel on behalf of Mr. Sturges claims, raises the principal and substantial question, as to the real merits of the controversy in this case. We concede this to be so. On page 31 of Mr. Scribner's printed argument this assignment of error appears in these words:

> The Circuit Court erred in its conclusion and judgment that certificates, or shares of capital stock, in the Western Union Telegraph Company, were taxable in the State of Ohio, in the hands of said Stephen B. Sturges.

This question will be determined by an examination and construction of the constitution and laws of Ohio in force during the period for which it is claimed by plaintiff in error that the Western Union Telegraph Company's stock was exempt from taxation in his hands.

Article XII, Section 2, of the Constitution provides that:

> Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, * * * * * *

In carrying out this provision of the Constitution of Ohio the Legislature passed the act of 1859. Swan and Critchfield's Statutes, page 1438. Section 1 of said act reads as follows:

> That all property, whether real or personal, in this State, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of persons residing therein; the property of corporations now existing or hereafter created, and of all bankers, except such as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of the value thereof shall be entered on the list of taxable property for that purpose in the manner prescribed by this act.

Section 2 defines the term "investment in stocks" in these words:

> The term 'investment in stocks,' wherever used in this act, shall be held to mean and include all moneys invested in the public stocks of this any other State, or of the United States, or in any association, corporation, joint stock company or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner, without the consent of the other partners or stockholders, for taxation of which no special provision is made by this act, held by persons residing in this State, either for themselves, or as guardians, trustees or agents.

Can there be any doubt that the $100,000 of Mr. Sturges' invested in the said stock of the Western

Union Telegraph Company, came within the class of investments described in the constitution and statutes of Ohio, not only by the manifest intent, but also the express language, of the constitution and act above referred to?

Article 6 of said act (S. & C., 1442), required each person to make out and deliver to the assessor a statement verified by his oath, "of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, in his possession or under the control of such person."

Mr. Sturges pretended to comply with this section; he made the affidavit but neglected to return his investments or any part of them. The plain language of section 1 of the statute is, that all *investments in bonds, stocks, joint stock companies*, of persons residing in Ohio, "*shall be entered on the list of taxable property.*" It was admitted that he was the owner, for each of the four years, of Western Union Telegraph Company stocks, of the value of $100,000, and the evidence in the Circuit Court, and the findings of said Court, is that he was also the owner of $100,000 in money during each of said years.

Now look at his returns for his pretended compliance with the law. In 1874 he returned for taxation only $2,515; 1875, only $2,550; 1876, only $2,095; and in 1877, only $1,915. For the returns made by Mr. Sturges to the assessor of his ward, see exhibits M., N., O., P., (Rec. 20--28).

There was an agreed statement of facts between the parties (Rec. 17) as to the Western Union Telegraph Company, as follows:

> The Western Union Telegraph Company is a corporation organized under the laws of the State of New York, and carries on the business of transmitting telegraphic dispatches into and through the State of Ohio and other States of the United States, for the public, for hire, and has for the last ten years. That its capital stock is $41,073,410, all paid up and of value.
>
> The said company owns real estate, not in the State of Ohio, exclusive of its line, of the value of $2,635,556.86. That the length of its entire line (poles) is 76,955 miles. The length of its line in the State of Ohio is 4,950 miles. Its entire length of wire 194,323 miles. Its length of wire in the State of Ohio is 13,500 miles. That its property within the State of Ohio consists of the said 13,500 miles of wire, the said 4,950 miles of posts, there being from twenty to thirty posts to the mile, the telegraphic apparatus, and chemicals, and office furniture of 425 offices in said State.
>
> That it has returned said property in the State of Ohio for taxation in the State of Ohio, each year since 1872.
>
> That all its other property is located in other States.

The sole ground upon which the learned counsel on behalf of Mr. Sturges bases the claim that the capital stock of this foreign corporation is exempt from taxation in the hands of citizens of Ohio, is because it owns a few poles and a few miles of wire, together with telegraphic apparatus, chemicals and office furniture, in Ohio, upon which it pays taxes.

It is not because there is a certain number of poles and a certain number of miles of wire and other personal property of a given value in Ohio that exempts the millions of the Company's capital stock from taxation owned by the residents of that State, but if there is anything in the argument of counsel, the point insisted upon is that if the foreign corporation owned any personal property in Ohio and paid taxes on the same, then all the certificates of stock issued by such corporation and owned by citizens of the State of Ohio, are exempt from taxation. If the doctrine is correct residents of Ohio can invest all their property in certificates of stock of foreign express companies owning an office and a delivery wagon in the State, and have their property protected and escape the burden of taxation. The argument of counsel brings us to that inevitable conclusion, if there is anything in it. Certainly the statutes of Ohio will not bear any such a construction as that, and we are equally certain that the Supreme Court of Ohio has never so construed them.

We admit that sub-division 9, section 3, S & C. 1441, cited by counsel for plaintiff in error, bears directly upon the question under discussion. It reads as follows:

> No person shall be required to include in his statement as a part of the personal poperty, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which he is required to list, any share or portion of

> the capital stock or property of any company or corporation *which is required to list or return its capital and property for taxation in this State.*

As stated by counsel for plaintiff in error, this provision was in force from 1859 down to July 1, 1878.

In section 59 of the same general act of 1859 (S. & C. p 1460) instead of the words "*capital and property*" being used, the words used are "*capital stock.*" The entire clause of section 59 reads as follows:

> No person shall be required to list for taxation any certificate of the capital stock of any company the capital stock of which is taxed in the name of said company.

This provision was, not literally, but substantially, carried into the act of 1878, and forms a part of Section 2746.

The last named section reads as follows:

> Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. (Revised Statutes of Ohio, Section 2746).

We do not think that the provisions of the statutes of Ohio, above set forth are in any manner modified by section 16 (S. & C. 1446). This section is quite lengthy. It defines what kind of property owned by corporations shall be included in the terms "personal property" within the State of Ohio, and provides for the listing of the same for taxation. And it is intended to compel a return of all personal property, within the State, by every joint stock company, foreign or domestic. The foreign rail road company, with its many miles of road bed, returns the same for taxation; so does the foreign express company. its horses, wagons and office furniture; and the Western Union Telegraph Company is within the same class. But there is no language in this section requiring any of these foreign corporations to list for taxation in Ohio *all of its capital stock*, or all of its property, or all of its capital, or any of the certificates of stock issued by it. It only returns what personal property is within the State, whether it be much or little.

If the language of said section 3, sub-div. 9, Swan & Critchfield 1441, was, as follows: Any company or corporation which is required to list or return *any part of* its capital and *any part of* its property for taxation in this State; then we would concede the construction insisted upon by counsel of Mr. Sturges to be correct. But the language used is, "its capital and property," which can only mean *all* of its capital and *all* of its property.

And in said section 2746, Revised Statutes of Ohio, the language is not less broad although it is some what different. The language there used is as follows: "the capital stock of which is taxed in the name of said company." Not any part of the capital stock, but "*the capital stock.*" It could not have been clearer or more comprehensive if the words were *all of the capital stock.*

The Western Union Telegraph Company did not return its capital stock, or any part of it, for taxation in Ohio.

But it is urged that the Circuit Court was in error as to the construction placed upon these statutes by the Supreme Court of Ohio. We hope to be able to show that the learned judge was correct, and that the Supreme Court of Ohio did construe said statutes to mean that stock of foreign corporations in the hands of citizens of the State, was subject to taxation, and the fact that taxes were paid by the corporation on a small amount of personal property situated within the State, made no difference.

The question first arose in the case of *Worthington vs. Sebastian, Treasurer of Hamilton County,* 25 Ohio St., 1. The syllabus of the case is as follows:

> Investments in bonds and stocks of foreign corporations by residents of Ohio may lawfully be taxed in Ohio, and the provisions of the act of April 5, 1859, (2 S. & C. 1438) imposing a tax on such bonds and stocks, are not in violation of the Federal or State Constitution.

The opinion of the Court was delivered by Judge Welch, and on page 7 it is said:

> The taxes were assessed under the act of April 5, 1859 (S. & C. 1438), and it is not denied that the assessments were made in conformity to the requirements and provisions of that act. The act subjects to taxation 'all moneys, credits, investments in bonds, stocks,' etc., 'of persons *residing in the State*,' and especially declares that the terms 'stocks' and 'bonds' shall apply as well to stocks and bonds issued out side of the State, as to those issued in the State.

And in the same case, page 9, it is said:

> The statutes of 1852, enacted at the first session of the General Assembly, after the adoption of the present constitution, is substantially similar in this respect to that of 1846, and likewise to that of 1859, under which these taxes were assessed; in other words, for nearly a third of a century, and ever since we have had an *ad valorem* system of taxation, the people of the State have acquiesced in the policy of taxing resident owners of credits, notes, bonds, stocks, and the like, without regard to the residence of the *debtor*, or the place where the securities are issued or made payable.

At the same time the Worthington case was argued, three other cases were argued and submitted, one of which involved the taxation of railroad stocks, and in concluding the opinion, on page 11, the court says:

We see no substantial difference between the four cases. The subjects of taxation in all of them clearly fall within the broad language of the constitution—'*all investments* in bonds, stocks,' etc.,—and it is admitted that they are within the purview of the acts under which the lines were made.

As to this case, it is claimed on behalf of plaintiff in error, that it is a case involving the taxation of stocks and bonds of foreign corporations, having no property within the State. It does not appear as to the *Valette*, *Bugher*, or *Lord* cases, whether either of the foreign corporations had property within the State or not. No importance, at least, was given to that fact, and we cannot see how it is entitled to any weight in determining the question.

When this Sturges case was argued before Judge Baxter in the Circuit Conrt, the case of *Bradley vs. Bauder*, reported in the 36 Ohio State, 28, had been decided by the Supreme Court of Ohio, but it had not been reported. We obtained a copy of the opinion of the court and of the record, and also copies of of the printed arguments of the counsel engaged in the case, which we submitted on the trial of the present case in the Circuit Court.

The facts of the case show that Bradley and others brought an action to enjoin the auditor of Cuyahoga County, in the State of Ohio, from placing upon the duplicate for taxation, investments in the capital stock of corporations created in other States, owned by plaintiffs, residents of the State of Ohio.

The corporations were railroad, mining, manufacturing, and express companies, and each derived its franchise wholly from the State where it was located.

The petition avers that their capital stock is all invested in real estate and other fixed property situated in other States. It is also averred in the petition (page 4 printed record on file in Supreme Court of Ohio),

> That the Adams Express Company is a corporation organized under and in pursuance of the laws of the State of ———, doing business and running its lines through other than said State of ———, including said State of Ohio, the capital stock of which said company is invested and represented by its property so used and employed.

And this further averment is made (on page 8 of said printed record),

> *That the Adams Express Company, by the laws of the State of Ohio, is required to, and does pay taxes upon that portion of the property of said company, located within and employed in the prosecution of said business of said company in the State of Ohio.*

The question arose on demurrer to the petition, avering that the petition did not state facts sufficient to constitute a cause of action against the defendant. The petition is lengthy but an examination of it will show that the precise question claimed by counsel on behalf of Mr. Sturges was involved in the Bradley case as to the Adams express stock.

Judge Rufus P. Ranney, one of Ohio's most eminent lawyers, appeared for the plaintiffs in error, Bradley and others, in the Supreme Court of Ohio; and in his printed brief, on page 2, in describing the class of stocks that it was sought to tax, says:

> An express company created and located in the State of New York, whose lines extend into this and other States."

And on the same page he says:

> * * * And that the express company pays taxes in this State upon all that portion of its property employed in the prosecution of its business here.

So there can be no doubt that as to the Adams express stock, the same question was raised and disposed of in the Bradley case, that is now in controversy in this Sturges case, and if the reporter had set forth a copy of the petition in the statement of facts, the eminent counsel on the other side would never have doubted that this question was raised and decided in Ohio as to the Adams express stock.

The syllabus of the cast (36 Ohio St. 28) is as follows:

> 1. By the provisions of the act of May 11, 1878 (75 O. L. 436) an owner residing in Ohio, of shares of stock in a foreign corporation, is required to list the same for taxation, notwithstanding the capital of the corporation is taxed in the State where the corporation is located.

2. The provisions of said act subjecting such shares of stock so owned, to taxation in this State, are not in conflict with the constitution.

Although the record of the case shows that the Adams Express Company, by the laws of Ohio, pays taxes upon that portion of its property located in Ohio, and the demurrer to the petition admits that to be a fact, yet in the opinion no weight is given to the question. The real fact is that the shares of stock are owned by residents of Ohio, in foreign corporations, and that the *capital stock* is not taxed in Ohio, but is taxed in the state where the corporation is located. The court says the same question was involved in the Worthington case (25 Ohio St. 1). And in the opinion Boynton J, page 32, speaking of the Worthington case, says:

> The quesiton arose under the act of 1859 (S. & C. 1438); but the provisions of that act, in respect to property made subject to taxation, were substantially the same as those of the act of 1878, under which the right in the present case is asserted to tax the shares of the plaintiffs in foreign companies.

And can language be more explicit than that used on page 34, where it is said:

> In view of these provisions it is perfectly obvious that shares of stock in corporations, wherever located, owned by our citizens, are subject to taxation, except in cases falling within the operation of the proviso of section 13,

unless the statute is open to constitutional objection. The proviso to the 13th section, exempting from taxation any share or shares of stock in any company, the capital stock of which is taxed in the name of the company, is a substitute for the same provision found in the first clause of section 59, of the act of 1859. *It had in that act, as in the act of* 1878, *no reference to shares of stock in foreign companies. It is only where the capital stock of the company is required to be taxed in Ohio, that the right to such exemption obtains.* The purpose of the proviso was to exempt from taxation the shares of stock in corporations, where the State had exercised the right to tax the capital stock in the name of the company. No such tax could be imposed upon property of foreign companies not situated within the State. * * * But investments in stocks in foreign companies, owned by residents here, *being property within the State*, are not only made subject to taxation by the constitution, but, as we have seen, their taxation is expressly required by the statute.

And on page 35 it is stated that the capital stock of a corporation and the shares of stock are a distinct species of property. The language is as follows:

Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its *situs*, so far as shares of stock are capable of one, is in a different state.

The capital of a corporation, whatever invested in, and the individual shares of stock, are distinct species of property. *Farrington vs. Tennessee*, 95 N. S. 679. *The owner of a share of stock owns no part of the capital of the company.*

And on page 36 it is said:

> The constitutional power to tax shares of stock owned by our citizens in corporations located without the State, does not depend on whether the capital stock of the corporation is or is not taxed in the State where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not."

A careful examination of the *Bradley* and *Worthington* cases, will remove any doubt that may have been entertained, as to the construction placed upon the acts of 1859 and 1878 by the Supreme Court of Ohio. Those decisions place the certificates of stock in the Adams Express Company, Western Union Telegraph Company, and all other foreign corporations in the same class, and subject them all to taxation when owned by a resident of Ohio.

And these decisions of our Supreme Court are fully in accord with the best considered opinions in other states, and also with the decisions of the Supreme Court of the United States, as we understand them. The Supreme Court of Ohio, in support of the opinion of the Bradley case cite the cases of *Railroad Company vs. Pennsylvania*, 16 Wall. 300, *Farrington vs. Tennessee*, 95 U. S., 679; *Tappan vs. Merchants National Bank*, 19 Wall. 490, and *Kirtland vs. Hotchkiss*, 100 U. S. 491.

Counsel on behalf of Mr. Sturges cites at length and seems to rely upon the case of *Jones, Auditor vs. Davis*, 35 Ohio State 474, as supporting the propositions maintained by him. We do not think it does sustain them, but on the contrary, that it fully sustains our view of the construction placed on the Ohio statutes by the Supreme Court of that State. The question involved in that case was whether the shares of stock owned by a resident of Ohio in a corporation organized under the laws of Ohio, should have been listed by him for taxation, the corporation having invested *all its capital stock* in real and personal estate necessary for the daily conduct of its business *and which real and personal estate, together with its moneys and credits, were listed for taxation in Ohio according to the requirements of the statute.* (See statement of facts 35 Ohio State 474.) That is, could the same property be taxed twice within the same jurisdiction, once as capital stock of the corporation, and once as certificates of stock in the hands of the resident of the state?

The Supreme Court of Ohio decided that it could not be thus taxed twice. And the reasoning is sound and in accord with sound principles and the best of precedents. The distinction is quite apparant between this case and the later case of *Bradley vs. Bauder* in 36 Ohio State 28. The opinion of the court in both cases was announced by Judge Boynton. In the *Jones case* it was the certificates of stock of a domestic corporation sought to be taxed *and all of the capital had been returned for taxation in Ohio by the corporation itself*. Capital stock is defined on page 477 in these words:

> The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully within the meaning of the Statute, after it has been converted into property necessary for its business operations, and for which it was subscribed, as before. *Bank tax case*, 2 Wall, 208; Farrington vs. Treasurer, 95 U. S. 686. For the purposes of taxation the capital stock is represented by whatever it is invested in.

And on page 479, it is said:

> The property which the Elevator Company was required to return for taxation *very clearly embraced its capital stock*, and the action of the Board of Equalization, in adding $12,000 to the return of the Defendant in Error was, therefore, wholly unauthorized.

It will be noted that the elevator company returned, not a part of its property, or a part of its capital, *but all of its capital stock* invested in its property. So it is within the express language of the statute.

Counsel on the other side (printed brief, 43) as to this *Jones case*, says:

> In the case cited, the company whose shares were sought to be taxed, was a domestic corporation, and all its property *happened to be within the State*, but that makes no difference in the principle to be applied.

That is just what makes *all* the difference in the principles here applied. The statute provides that when all the capital stock is returned for taxation in Ohio, then the certificates in the hands of a resident of the state need not be returned. The court find in the *Jones* case that the corporation had returned all its capital stock and therefore the certificates of stock in the hands of Jones were not taxable. And in the *Bradley* case (36 Ohio St., 28) the court held that certificates of stock in the hands of individuals of Ohio, in foreign corporations, were subject to taxation, for the reason that the capital stock was not taxed in Ohio. So the fact that it is a domestic corporation and all its capital stock is taxed within the state, should and does make a difference, and *the sole* difference.

In the case of *Commonwealth vs. Standard Oil Company*, 101 Penn. St. 119, construing a statute of that state, the rule adopted is identical with that in Ohio. It was insisted on behalf of the commonwealth of Pennsylvania that all the capital of the Standard Oil Company could be taxed in the state of Pennsylvania, although it was an Ohio corporation, and its capital stock was not all within the jurisdiction of Pennsylvania. But is was claimed that the corporation entering the state to do business took with it all its capital stock. And the Supreme Court of Pennsylvania negative that proposition and hold that it can only tax the property within the state.

But it is said that a common pleas judge of Ohio differed from Judge Baxter as to the law. That is true, and that case is now pending in the Supreme

Court of Ohio, and it might be entitled to some consideration if the question had never been considered by the highest tribunal in the state.

It is not seldom that common pleas judges, and some very good ones, do not know what the courts have decided or misunderstand very plain decisions of the highest court of the state. If it seldom occurred, the labor of reviewing courts would be very much lessened. And this is one of those instances. The 39 Ohio State Rep. had not been issued in March, 1884. In the case of *Grant vs. Jones* in that volume, page 514, the Supreme Court of Ohio cite with approval the *Bradley* case in these words:

> The point was again decided by this Court in *Bradley vs. Baudor*, 36 Ohio St., 28. It was there held that the residence of the owner of shares of stock in a foreign corporation determined the right of this State to tax such shares, *and if he resided in Ohio they were taxable here*, though the capital was taxed in the State where the corporation was located.

If we are right as to the construction of our tax laws by the Supreme Court of Ohio it would seem to be conclusive as to this alleged ground of error. The Supreme Court of the United States, as we understand the decisions as to this class of statutes, will adopt the construction placed upon them by the Supreme Court of the respective states. And when exemption is claimed for any species of property, from a fair proportion of the burden of taxation, the party asserting it is required to establish the fact; for every presumption is against such a claim. It was so held by this court in *Farrington vs. Tennessee*, 95 U. S. 686, where it is said:

> The exercise of the taxing power is vital to the functions of government, except when specially restrained, the States possess it to the fullest extent. *Prima faci* it extends to all property, corporeal and incorporeal, and to every business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed, it must be shown indubitably to exist. *At the outset every presumption is against it. A well founded doubt is fatal to the claim.* It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.

And in the case of *Kirtland vs. Hotchkiss*, 100 U. S. 497, this court quoting the language in the case of *State tax on foreign held bonds*, (15 Wall. 300) say:

> In the last named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."
>
> We see no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relation which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends in no

small degree the harmonious working of our complex system of government, Federal and State.

III.

Counsel on behalf of plaintiff in error says that the sixth assignment of error "is intended to present the question as to whether or not the act of 1878, under which the supplemental assessment was made, is retrospective in its operation." (*Mr. Scribner's argument, p* 51.)

We understand the proposition here argued by counsel to be that the act of 1878 is retrospective in the sense that it impairs the obligation of contracts; or disturbs vested rights; creates a new obligation; or impairs a new duty, so as to be in conflict with article 2, sec. 28, of the constitution of Ohio. If the act does neither, but is merely remedial in its operation, intending to give a remedy to enforce a pre-existing obligation or duty, then it is not repugnant to the constitution.

This question has been considered by the courts of Ohio in numerous cases, and the holding uniformly has been that if the law did not impair the obligation of contracts or disturb vested rights, but was remedial in its operation as to rights, duties, and obligations that had existed before the passage of the act, then it was not in conflict with the constitution.

The plaintiff in error was under a legal obligation to return his Western Union Telegraph stock for taxation for the years 1874, 1875, 1876, and 1877, but he refused to do so; now the act of 1878 provides the remedy against such persons as have refused to comply with the law, and are unwilling to bear an equal proportion of the burden of government.

In the case of *Rairden & Barnet vs. Holden, Adm'r*, 15 *Ohio St.* 207, this section of the constitution of Ohio was construed by the supreme court of that state. The syllabus of that case is as follows:

> 1. The act of April 7, 1854, "concerning suits on the bond of executors and administrators" (4 Curwen Stat. 2571) is not in conflict with the provision of article 2, section 28, of the constitution, which declares that the "general assembly shall have no power to pass retroactive laws."
>
> 2. A statute purely remedial in its operations on existing rights, obligations, duties and interests, is not within the mischiefs against which that clause of the constitution was intended to guard, and is not, therefore, within a just construction of its terms.

And in the opinion by Brinkerhoff, Chief Justice, on page 210, it is said:

> The words, "retrospective" and "retroactive," as applied to laws seem to be synonomous, and as such they are used interchangeably by Mr. Sedgwick in his treaties on constitutional law.

Then the definition of Judge Story is quoted, as follows:

> Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective.

Then on page 211 it is said:

> Assuming, then, that these prohibitory clauses of the Ohio and New Hampshire constitutions are substantially identical in signification, and applying the definition of them by Judge Story as the test, it seems to us the statute now in question before us is free from constitutional objection. It neither "takes away or impairs vested rights acquired under the pre-existing laws;" * * * It creates no "new obligation," imposes no "new duty," and "attaches" no "new disability."

To the same effect are the cases of *Seely vs. Thomas*, 31 Ohio State, 301; *Green Tp. vs. Campbell*, 16 Ohio State, 11; *Kearney vs. Buttles*, 1 Ohio State, 362; *Goshorn vs. Purcell*, 11 Ohio State, 641: *State ex. rel. Bates vs. Richland Tp.*, 20 Ohio State, 362.

There was a case decided by the District Court of Hamilton county, Ohio, in 1881—*Kleinschmidt vs. Cappeller, Auditor, and Staley, Treasurer*—reported in the Cincinnati Law Bulletin, vol. 6, p. 325, which is in point. The court was composed of Judges Cox, Johnston and Longworth. It was claimed by plaintiff in error that the act of March 5, 1881 (Revised Statutes of Ohio, section 2803), authorizing the auditor to value and put on the duplicate omitted property, since the last decennial appraisal, was unconstitutional. The court says:

> There is no doubt that this act gives to the auditor the right where the property has not been returned by the assessor in any previous year to fix a valuation upon it, and put it upon the duplicate. It is claimed, however, that this act is retroactive, and is unconstitutional by reason of this fact. * * * It impairs no obligation or contract. It does not change the relation of the parties. It simply puts the property where the constitution contemplates that it shall, creates an agency by which it may be assessed at its fair valuation in money. The relation of the parties is not changed, because it is a right which the State has to have it placed upon the duplicate and the right which every citizen is bound to submit to; and although it may have escaped in previous years, there is no reason why it should not be put upon the duplicate, and the taxes which the party, under the constitution is bound to pay, collected whenever it is discovered that the property has been omitted.

And the case of *Conner vs. Willson*, reported in vol. 9, p. 1, of the American Law Record, in which these same sections 2781 and 2782 (Revised Statutes of Ohio) as to the right of the auditor to go back four years, as provided therein, and place on the duplicate omitted property, were considered and construed by Adams Common Pleas, in 1880, it was held:

> A tax-law (Revised Stat,. secs. 2781 and 2782) authorizes the auditor to go back four years prior to the *date of the taxing effect* of the law, in his corrections of false returns of tax-payers, and to charge them with the proper amount for that time, and in this respect is retractive. But such statute does not create a new liability, but provides a remedy to enforce an existing liability, and hence is not retractive within the meaning of article 2, section 28, of the constitution of Ohio.

In view of these decided cases and the evident intention of the legislature, in the statute itself, we maintain that it is a remedial act and is not open to the objection of counsel of being retrospective in the sense that it conflicts with the Constitution of Ohio.

IV.

As to the last assignment of error, that neither a penalty nor interest could properly be charged against Stephen B. Sturges; it seems to us that it amounts to this: That if Mr. Sturges had honestly returned his property for taxation and then had failed to pay the taxes when due, a penalty would attach as provided by statute, but because he failed to make any return and also refused to pay his tax when due, he must escape the penalty. He not only has the use of the money year after year that properly belongs to the state, but he also has immunity for violating the law that the citizen who makes an honest return of his property but fails to pay his taxes when payable does not get.

Vol. 75 *Ohio L. p.* 457, *sec.* 48, (*Sec.* 27, 81 *Revised Statutes*,) cited by counsel for plaintiff in error, to sustain this proposition, provides that the auditor may *add fifty per centum* to the amount the person ought to have returned for taxation, and to place the same on the tax list, but he is not permitted to add this penalty of fifty per centum for the years preceeding the one in which the inquiry was made. For the other years he places the simple taxes only on the duplicate, and only the simple taxes were charged against Mr. Sturges. But when he refused to pay and made it necessary for suit to be instituted then the penalty of ten per cent., as required by law, was charged against him. The simple taxes and penalty of ten per cent. is the sum for which judgment was entered against the plaintiff in error in the circuit court. The judgment in the circuit court bears interest the same as any other judgment withont regard to whether it was for taxes or not. That is the rule laid down in the case of the *Bridge Co. vs. Mayer*, 31 *Ohio St.* 317.

We respectfully submit that the record in this case shows no error in the proceedings of the circuit court.

JOHN W. JENNER, and
ANDREW SQUIRE,
of Counsel for Defendant in Error.